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The Coming of Age of Cosmopolitan Law

Crimes Against Humanity and their Prosecution

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This work is dedicated to

Dora

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ABSTRACT

In the era of globalization many writers (e.g. Hannah Arendt, David Held, Robert Fine) have argued that the ideology of nationalism is being challenged by the growth of cosmopolitan developments, ideas and institutions. This thesis takes off from the evolution of 'cosmopolitan criminal law' out of international law. It argues that implicit in the elaboration and use of the 'crimes against humanity' charge at Nuremberg and at the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR), is the admission that genocide and ethnic cleansing are the business of the whole of humanity and that perpetrators may no longer hide behind the principle of national sovereignty. I argue that the establishment of the principle of individual criminal responsibility for such crimes is not simply a legal fiction. I further argue that the greatly expanded role for short-term instrumental rationality which prevails in modern society (e.g. Zygmunt Bauman) does not limit social actors to a choice of either complicity in or a stepping out of society. The evidence shows that perpetrators do make choices for which they may be held responsible and are not simply puppets of rational structures. The thesis looks at three responses made by the international community to ethnic cleansing in the former Yugoslavia: the peace at all costs policy, which allowed ethnic cleansing to go unhindered in Bosnia; the bombing policy which failed to stop but reversed some of the effects of ethnic cleansing in Kosovo; and the establishment of the ICTY which is judging some of the perpetrators. I use the trials of Dusko Tadic and of Tihomir Blaskic as case studies to investigate the working of the first international criminal tribunal. I also investigate the trial of Andrei Sawoniuk, held in London in 1999, for his actions during the Holocaust in Belarus, and the libel trial in which David Irving sued Deborah Lipstadt. Using these four cases, I examine the functioning of cosmopolitan criminal trials, the different contexts in which they are held, their use of evidence and law, the extent and limits of the justice they achieve, and their role in the production of authoritative cosmopolitan narratives.

ABBREVIATIONS

BNP	British National Party
HV	Army of the Republic of Croatia
HVO	Army of the Bosnian Croats
ICJ	International Court of Justice
ICTY	The Ad Hoc International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991
ICTR	The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1999
IR	International Relations
JNA	Yugoslav National Army
KLA	Kosovo Liberation Army
NA	National Alliance
NATO	North Atlantic Treaty Organisation
TO	Bosnian Territorial Defence
SDS	Political party of the Bosnian Serbs
UN	United Nations
UNHCR	United Nations High Commission for Refugees
UNPROFOR	United Nations Protection Force

CONTENTS

Abstract

Acknowledgements

Abbreviations

Introduction **1-25**

Notes on Methodology

Chapter 1 The theory of cosmopolitanism and international law **26-51**

- a) Absolute national sovereignty: the development of a remarkably stable and enduring principle
- b) Cosmopolitanism: the doctrine of absolute national sovereignty begins to break down
- c) Hannah Arendt: beyond the nation state
- d) David Held's Cosmopolitanism: A new world order or castles in the sky?
- e) International law develops quickly and boldly

Chapter 2 Individual responsibility and cosmopolitan law **52-77**

- a) Modernity and the Holocaust: Bauman's critique of rational choice
- b) Rationality and the Holocaust reconsidered
- c) Police battalion 101 and individual responsibility
- d) Adolf Eichmann and individual responsibility
- e) Conclusion on individual responsibility

Chapter 3 Crimes against humanity: the development of a universal **78-110**

- a) The International Military Tribunal at Nuremberg
- b) Crimes against humanity
- c) The Genocide Convention and the problems of defining genocide

<u>Chapter 4</u>	<u>Peace, security and justice in the former Yugoslavia</u>	111-144
a)	Peace before justice: Srebrenica and Dayton	
b)	Peace and justice without risk and at a price: Kosovo	
c)	Omarksa: an intimate concentration camp	
d)	The UN response: the international criminal tribunal for the former Yugoslavia (ICTY)	
<u>Chapter 5</u>	<u>Case studies from the ICTY: the trials of Tihomir Blaskic and Dusko Tadic</u>	145-172
a)	The case of General Tihomir Blaskic	
b)	The case of Dusko Tadic	
c)	Towards an international criminal court	
<u>Chapter 6</u>	<u>The trial of Andrei Sawoniuk: a cosmopolitan trial under national law</u>	173-223
a)	The ordinary and extra-ordinary Andrei Sawoniuk	
b)	Ben-Zion Blustein: Holocaust memoir and legal testimony	
c)	The Evidence of the Local Witnesses	
d)	Sawoniuk under cross examination	
<u>Chapter 7</u>	<u>Irving v Lipstadt: the legal construction of authoritative cosmopolitan Narrative</u>	224-250
a)	Irving v Lipstadt	
b)	Towards a global social memory	
<u>Chapter 8</u>	<u>Conclusion</u>	251-267
<u>Bibliography</u>		268-275

INTRODUCTION

On 28 January 2000 I was at the Royal Courts of Justice in the Strand, in London. Outside the building was a large, angry, noisy demonstration consisting mainly of Chileans, displaying hundreds of photographs of individuals who had been murdered by the Pinochet regime. Augusto Pinochet was attending an appeal by the Kingdom of Belgium against the British Home Secretary's decision that the general was unfit to stand trial for crimes against humanity due to his poor health. Upstairs in the same building, judges were hearing the unsuccessful appeal of Andrei Sawoniuk against his conviction for the murder of Jews in Belorus during the Holocaust. In court 73 there was a collection of Jews, historians, Nazis and journalists watching the Irving v Lipstadt libel trial. In the Pinochet case the court confirmed the principle of universal jurisdiction for crimes against humanity and torture. In the Sawoniuk case the court upheld the conviction of a man for crimes committed as part of a genocide in another country. In the Irving case the court produced a lengthy closely argued judgement which placed the Nazi propaganda of David Irving outside of what may be properly referred to as historiography. That sunny winter's day in London it felt as though something interesting was happening.

On the same day, there were crimes against humanity trials being routinely heard by international courts in the Hague, in relation to ethnic cleansing in the former Yugoslavia and in Arusha, in relation to the genocide in Rwanda. In recent years there have been trials and campaigns for trials in many countries which were occupied by the Nazis; also in Cambodia in relation to the genocide there; in Korea in relation to the organised mass rape of the so called 'comfort women' by Japanese soldiers; in East

Timor in relation to the mass killings carried out by the Indonesian regime. In the summer of 1998, 120 states agreed in Rome to set up an international criminal court; an extension of the *ad hoc* tribunals for the former Yugoslavia and Rwanda into a permanent institution.

There has been much darkness in the twentieth century; genocide, racist ethnic cleansing, torture, industrialised humiliation and the mass production of terror have been commonplace. Those who perpetrate such cruelties, the ideological, the greedy, the enraged victims of some previous injustice, the stupidly loyal, the sadists; they move stealthily in their self-created dusk. The bright winter sunshine in London was not as illuminating as it seemed. The image of enduring brilliant light penetrating all the shadows of totalitarianism was illusory. But there have been flashes and sparks which have momentarily lit up the landscape. This thesis focuses on those. It seeks to sketch some of the scenes which are momentarily illuminated by cosmopolitan criminal law and it seeks to assess the significance and trajectory of the fragments of cosmopolitan criminal law which find a fleeting and tentative existence. Sparks and flashes are unreliable, unpredictable and dangerous, but they create bright light nevertheless. The existence of the fragments of light is the starting point of this work.

As a just and stable framework which guarantees the basic human rights of all people, cosmopolitanism does not exist. It exists in the form of abstract ideals and it exists as fragments of inadequate law, treaty and institution. There are two opposite traps set for those who start their analysis with an abstract ideal of cosmopolitanism. The ideal exists firstly as a set of principles, or as a blueprint for how the world could be more fairly or efficiently ordered. The detail of the ideal global structure can be as elaborately

planned and sketched as the theorist wishes; the cosmopolitan world can be designed as if no flawed world ever existed. The problems, however, begin when the theorist turns to the existing world and understands it only in relation to their ideal. Then, it is tempting to see each flash of light as a solid step towards the ideal; to make sense of any event either as a sign of progress towards the ideal, or as an insignificant temporary aberration from that progress. Alternatively, the theorist may start with a dystopic picture of the existing world which is so corrupted and filled with injustice that it inevitably falls far short of the cosmopolitan ideal. The real world is always overshadowed by the ideal. Those who live in the world of abstract ideal cosmopolitanism either see the world as on a path towards it or as on a path which can never approach it.

These are methodologies which both distort reality and which make it possible to avoid confronting the real horrors which exist. The killings of whole families, communities, peoples, cannot be properly understood as either aberrations from the path of progress or as yet more examples of the inevitable darkness of the existing world; they must first be understood simply for what they are. To understand such events, it is necessary to look at them closely enough to see a little of the grief, the terror, the humiliation and the desolation. The pain of human history cannot be avoided by fitting it into an abstract theoretical model. The events come before the theory. The complexity and contradictions of events cannot be re-shaped and simplified in order to fit their own explanation.

The problem does not lie in the construction of ideals against which to measure existing reality. Social actors are moved to act when they judge existing events or institutions or practices to fall short of ideals which they can imagine. This is how things

change for the better. Problems arise when social theorists allow the ideal world that they can imagine to distort or colour their perception of the actual world. Moreover, the work of comparing the existing world to an ideal world is work which is done by any engaged social actor; it is not work about which social theory has any privileged insight or technique. As social theorists we can study the world and try to explain how it works. We can discern this or that potentiality for development. But we do not have any particular authority to proclaim what ought to be, or to measure the existing world against our own personal ideal.

Following the end of the second world war the four victorious powers organised cosmopolitan trials at Nuremberg. Within a year the energy and idealism of the process was spent. The cold war which followed it lasted for half a century; half a century when talk of cosmopolitan criminal law seemed to be nothing more than utopian dreaming. Following 1989 there was a widespread re-emergence of talk about cosmopolitan criminal law, culminating in the two *ad hoc* tribunals, for Yugoslavia and Rwanda and the treaty for the international criminal court. These events can be understood in two different ways. Nuremberg was the start of the process of the development of cosmopolitan criminal law and the fifty year cold war was simply a brief intermission before the process resumed from where it left off; it has been gaining momentum ever since. Alternatively, Nuremberg could be seen as a fundamentally flawed display of victor's justice, the cold war as the usual business of international relations between murderous and ruthless powers, and the re-emergence since 1989 as no more than a short-lived fantasy before lawless power again eclipses any hope of global authority. Neither of these approaches is adequate, or at least, we have no way of knowing, as yet, which

will turn out to look the more correct. Continuing the metaphor of cosmopolitan criminal law as sparks and flashes of light in the darkness, what we can see, is that following the pitch darkness of Nazi rule there were some bright flashes and sparks in 1945 and 46; there was a long period of darkness, followed by twelve years in which the darkness has been illuminated, quite often but in a very patchy and incomplete way, by a series of sparks and flashes. We do not know whether that twelve years will be followed by a long period of darkness or by a period in which the sparks and flashes of law become more enduring, regular and predictable and transform into something which can sustainedly illuminate the dark shadows of mass murder and terror. In this thesis, I try to restrict myself to looking at the flashes, and to theorising their potentialities. I am not committed to a framework which understands cosmopolitan criminal law to be part of an inevitable civilising process or to one which understands that it is simply a cover for the great powers to carry on their usual business of domination. I start with the social phenomena of crimes against humanity themselves and with the institutions of law which designate them as such.

I am, however, not neutral between the darkness and the flashes of light. The existence of flashes of light are highly problematic for those who hold the view that cosmopolitan criminal law is nothing other than a legal fiction, or a form of imperialist domination. If there are cracks or faults in the monolith of domination by the rich and the powerful, then there is no monolith. If there are gaps and spaces which law can fill and enlarge, if law is able to attain some independence from the powerful, then an understanding of law which sees it simply as a subterfuge which lends legitimacy to

illegitimate power is unsustainable. The sparks in the darkness and the cracks in the monolith cannot be written off as aberration.

By May 1994, at least 200 000 people, nearly all Tutsi, had been killed in Rwanda, but the US government instructed its officials not to call this a genocide.¹ This was because even though a legal duty to act in defence of those being killed does not flow directly from such a characterisation, a refusal to use the term makes it easier not to act. The moral power of the term 'genocide', which flows partly from its legal existence, is considerable. Why, if international relations is only about power, does the US government find itself playing these word games in order to help it to deny the undeniable? Clearly, there are other considerations at work than naked power. This is a small example of how the powerful find themselves having to take notice of moral and legal duties. It is a small crack in the monolith of power; but cracks signify possibilities.

There is a large and comprehensive body of international criminal law. There are treaties, conventions, charters; there is customary international law and precedent. One key question which I am trying to answer in this work is to what extent that body of law has attained a genuine existence outside of UN libraries and international law journals. It is clear enough that it does not exist as a settled system of criminal law, which routinely tracks down and puts on trial those responsible for crimes against humanity, independently of where they commit their crimes and on whose behest. It is clear enough that international criminal law is bogged down by power politics and the veto of the great powers in the security council. International criminal law does not exist as a finished set of institutions and principles. But to what extent does it exist as sparks, flashes and

¹ Cohen, S. (2001). States of denial: knowing about atrocities and suffering. Cambridge, Polity, p. 162.

cracks? This is the key question which I aim to answer in this work. If there are sparks and flashes in the darkness, then what do they illuminate and what is their significance?

A number of important legal precedents have established the fact that the greatest human rights abuses, genocide, ethnic cleansing and torture, are subject to universal jurisdiction. Nuremberg, Tokyo, the *ad hoc* tribunals, the Pinochet judgement: all have clearly established the law that such crimes may be tried by international courts or by the national courts of any state. A state may no longer argue that the principle of national sovereignty disbars foreign courts from trying its nationals for such crimes or trying those suspected of committing such crimes within its territory. In that sense, as in others, the principle of absolute national sovereignty is dead. National sovereignty is no longer absolute, but is related to other forms of sovereignty. Crimes against humanity are the concern of humanity as a whole, irrespective of where and under what jurisdiction they were committed. The principle of individual legal responsibility for such crimes, no matter whether they were carried out at the behest of states or by the leaders of states or with the blessing of the legal system of states, is also clearly established.

It is a universally accepted cliché that the Holocaust must never happen again; yet it happens. Much social theory since the defeat of Nazism and the communist regimes has been concerned with the quest for antidotes to totalitarianism. Often, these antidotes have focused on a distinction similar to the one which Habermas² draws between life-world and system. Much civil society theory which emerged in central Europe in the 1980s³ takes a similar form with its counter-position between civil society and the state.

² **Habermas, J.** (1987). *The Theory of Communicative Action, vol II, Critique of Functionalist Reason*. Cambridge, Polity.

³ For example, **Havel, V.** (1993). 'Anti-Political Politics'. in *Civil Society and the State*. J. Keane (Ed). London, Verso.

Life-world is the sphere of social life where living beings are able to be free; system is that sphere where machines of power such as states, secret police outfits and corporations dominate free beings. Civil society is the sphere of free association, free expression and participatory democracy; the state is the sphere of coercion, politicians and ersatz representation. Civil society is “that set of diverse non-governmental institutions which is strong enough to counterbalance the state and ... prevent it from dominating and atomizing the rest of society”.⁴ Bauman’s postmodern ethics⁵ also take a similar form: the structures of power and meaning which dominate modernity deaden the ability of the individual to relate to others as human beings. These antidotes to totalitarianism, therefore consist in ensuring the existence of a strong and vibrant life-world or civil society which can always act as a counterweight to the domination of system, state and capital.

An Arendtian view of the rise of totalitarian movements, however, could be understood to paint an opposite picture.⁶ It sees the totalitarian movement itself as a manifestation of an enraged and atomized civil society which manages to break free from all institutional fetters, to smash the state, and to proceed to rule directly without the constraints of state, politics or law.

In Fine’s critique of civil society theorists, he argues that it is one-sided and menacing to grant primacy to civil society, just as it is to grant primacy to the state or to the market. He argues for the development of a ‘third way’ which can recognise the

⁴ Gellner, E. (1994). *Conditions of Liberty*. London, Hamish Hamilton. p. 5

⁵ Bauman, Z. (1996). *Postmodern Ethics*. Oxford, Blackwell.

⁶ Arendt, H. (1975). *The Origins of Totalitarianism*. San Diego, Harvest.

validity of the concept of civil society without romanticising it, without idealising it, and without abstracting it from its social and historical ground.⁷

This thesis focuses on an institutional antidote to totalitarianism, that of cosmopolitan criminal law; an antidote which may be understood to be positioned more in system than in life-world. It is concerned with the development of official structures and institutions which aim to deter or punish the biggest crimes known to humanity. I do not attempt to privilege the development of cosmopolitan criminal law as the most important antidote to totalitarianism, but as one weapon which is levelled against it, alongside others. Law does not put an end to the actions which are designated as criminal. Laws against burglary have not stopped burglary any more than laws against genocide, on their own, can stop genocide. Law is just one weapon. It is a complement to, not a substitute for political action, education and organisation against those social formations which seek to commit genocide or ethnic cleansing. There is no necessary contradiction between local people-based action and global institution-based action against totalitarianism; they can feed off each-other.

My aim is to discuss a number of theoretical and practical issues which relate to the evolution of cosmopolitan criminal law and to trace the trajectory of its development. I use a small number of in-depth case studies of trials against which to test the theory and to investigate some issues and problems and the ways in which they may be overcome.

In the first chapter I begin by making a distinction between international law and cosmopolitan law; inter-national law is the system of regulation which governs the relationships between states whereas cosmopolitan law is a development of that into

⁷

Fine, R. (1997). 'Civil Society Theory, Enlightenment and Critique'. in *Civil Society - Democratic Perspectives*. R. Fine and S. Rai (Ed). London, Frank Cass & Co.

something else. Cosmopolitan law is that emerging body of law which protects the human rights of individuals and groups, primarily from any threat which may be posed to them by 'their own' states or other state-like social formations. A fundamental contradiction in which I am interested is between the conflicting principles of absolute state sovereignty and human rights. This contradiction has always been resolved in favour of state sovereignty, but the emergence of cosmopolitan law is tipping the balance in favour of human rights.

Cosmopolitanism is one response to the inadequacy of nationalism. Arendt's work in tracing the origins of totalitarianism makes a compelling case to suggest that the nation-state is structurally unreliable in guaranteeing even the most basic human rights. She argues that it was the totalitarian movements themselves which first exploited cracks in the guarantee of nationalism and it was they who first broke out of the bounds of national parochialism. What is required in a response to totalitarianism is a recognition that the old institutional and ideological structures of nationalism which were supposed to guarantee rights were prone to failure under stress.

David Held argues that the only possibility of a democratic response to the processes of globalization lies in the development of cosmopolitan structures, in the first place legal ones, which can regulate the already cosmopolitan but unbounded growth of capital and other power structures. He argues for the revitalization of the concept of sovereignty, creating a layered theory whereby sovereignty becomes sited on different levels, local, regional, national and global.

Rosalyn Higgins argues for a flexible conception of international law as a normative system for decision making. She argues against the old conception, that of an

unchanging body of rules of which nobody takes much notice since in that conception, authority and power are centred in different spheres. Law as a decision-making process, based on the principles of human rights, lies not in counter-position to power but at the intersection of authority and power. Higgins' analysis of the existing reality and possibilities of supra-national law is a powerful and persuasive critique of the old 'realist' model which prioritized the principle of the inviolability of state sovereignty above the human rights of the citizens of those states. It is also a critique of the conception which understood international law to be outside and above the real structures of power in the world; an authoritative but powerless and weak voice for justice and truth.

Chapters two and three focus on the two constitutive innovations of cosmopolitan law which were made by the Nuremberg tribunals. The first is the establishment of individual responsibility for crimes committed by people even when they are acting on behalf of, or in leadership of, a state and even when their acts appear legal according to existing authority. The other is the codification of the new offence of crimes against humanity, which means that such crimes are recognized as the business of humanity as a whole, and therefore that they are subject to universal jurisdiction.

Chapter two asks whether the legal insistence on individual responsibility is justified. Do individuals actually make a decision to commit a crime against humanity for which it is just to hold them criminally accountable? Bauman provides an important sociological account of how such decisions are made. In his account, the structures of modernity replace moral choice with short term instrumental rationality. Perpetrators are bound so tightly within those structures, that it is only possible for a very few special human beings to step outside of the existing social world to act morally. The vast

majority are condemned to play their role as perpetrators and by-standers and do not possess the ability to make ethical choices for which they may be held responsible. If Bauman is right, then the insistence on individual responsibility is nothing more than a legal fiction which reproduces the same immoral rationality which was responsible for the crimes in the first place. I argue that the social universe of modernity is not one which counterpoises morality to rationality and that the structure is very rarely so all-powerful as to eliminate any role for agency. I examine Bauman's argument by looking at how particular perpetrators and groups of perpetrators actually came to be killers. I argue that the evidence supports the thesis that perpetrators make choices about what they do and that they could act otherwise. I conclude that the legal assignation of individual responsibility for perpetrators of crimes against humanity is justified.

Chapter three looks at the Nuremberg tribunals more closely and the way that the crimes against humanity charge developed there. I examine some of the responses to the formulation and use of the crimes against humanity charge at Nuremberg, particularly those of Kirchheimer and those explored by Fine, which are the responses of Jaspers, Heidegger and Arendt as well as those of the defendants themselves. While the Nuremberg process was seriously flawed in many ways, the aspect which I stress is that it indelibly set the two central precedents, of individual criminal responsibility and of the universal jurisdiction over crimes against humanity. Even if we were to accept that the tribunal found defendants guilty of crimes which did not exist at the time of their commission; even if we were to accept that the prosecuting states were guilty of similar crimes to those they judged, then we could question the justice of the particular convictions at Nuremberg; but following Nuremberg, no genocidaires can claim that they

were unaware that genocide was an international crime; no future genocidaires can utter “we were only obeying orders” without blushing. The innovations at Nuremberg became, following Nuremberg, clearly established precedents in cosmopolitan law.

I go on to discuss the codification of the crime of genocide, and some of the ways in which social scientists have looked at genocide since then with the emergence of *genocide studies*. The genocide studies scholars attempt to discover ever more accurate definitions for key terms, ever more intricate traits common to genocides, ever more statistical correlations. In this way they attempt to understand the social phenomena which they investigate. But they do not pay much attention to the ways in which those phenomena are understood by the structures and norms of society itself, that is to say, by developments in cosmopolitan law. It is, I argue, more useful to focus on the structures which the social reality develops in order to make sense of itself, than for social scientists to attempt to impose an abstract understanding onto that social reality.

In chapter four I explore the ways in which the three goals of peace, justice and security have been pursued in the former Yugoslavia by the international community. In the war in Bosnia security and justice were subordinated to a vain quest for peace and for the avoidance of conflict. The over-riding wish to avoid any disruption of the peace enabled the practice of ethnic cleansing to be carried out with little hindrance. In Kosovo, the international community focused on preventing and reversing the ethnic cleansing, yet with such a blunt use of force that peace, security and justice all suffered. The priority of the intervening powers to avoid putting their own soldiers at risk had not changed since Bosnia, but the policy which flowed from it took a very different form.

The establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY) focuses on justice, yet it was established under the Security Council's powers to pursue peace and security. I explore the process by which the ICTY came to be set up. In chapter five, I focus on two cases, parts of which I observed; those of a Croatian General, Tihomir Blaskic, and a small time Bosnian Serb political activist, Dusko Tadic. It is through these two case studies in particular that I investigate the actual working of a cosmopolitan criminal court.

Chapters six and seven centre on two case studies of trials concerning the Holocaust which took place in London in 1999 and 2000. They were both at the same time cosmopolitan and national trials: held under British law, but concerning the Holocaust which occurred elsewhere. While they had some striking similarities, they were also very different; one was a criminal trial of a genocidaire, the other was a libel trial brought by a neo-Nazi historian in order to silence an American writer's work about Holocaust denial. Both cases addressed the Holocaust with the hindsight of more than 50 years; one relying on eye witness accounts of particular incidents of brutality and murder, the other remaining mainly on the terrain of the interpretation of documentary evidence.

While cosmopolitan criminal trials have obvious roles in bringing criminals to justice and in deterring future crimes, it is another important aspect which I focus on in chapter seven. One of the strongest, most pervasive and widespread forms of collective memory is that which creates and re-creates myths of nationhood. Most of the evidence which is presented to crimes against humanity trials is strongly coloured by national social memories; the subject matter of such evidence is the most extreme ethnic and national conflict. I argue that the cosmopolitan legal process is like a machine whose

data is inputted in the form of national myth, yet whose output must be free from national particularity. The institutions of cosmopolitan law, as well as the body of law, rules and precedent which they are building up, are the mechanisms by which such cosmopolitan judgements may be arrived at. Crimes against humanity trials aim to produce authoritative narratives of the crimes; narratives given a particular form of authority by the legal processes and norms by which they are created. I argue that this is a part of the process of the evolution of a global collective memory which can play a role in undermining myths of nationhood, particularly those which have played their part in causing ethnic cleansing and genocide.

Methodology

The particular shape of this thesis, though not the fundamental arguments which it contains, is a little arbitrary. The thesis is not a comprehensive survey of developments in cosmopolitan criminal law nor is it an account of all crimes against humanity trials. It does not necessarily focus on the most important cases nor on the most interesting cases. The empirical heart of this work is the observation of four trials; the Blaskic and Tadic cases in the Hague and the Sawoniuk and Irving cases in London. These trials were within my reach, geographically and temporally.

The Hague trials represent a sample of the work of the Hague tribunal. The Hague tribunal is, along with its sister tribunal in Arusha, among the most interesting and important developments in cosmopolitan criminal legal history and I was fortunate to be able to observe some of its operation. Two of the cases taking place there at the time when I was carrying out my research were those of Tadic and Blaskic. The Tadic case

was the first ever to be tried by a UN court; the Blaskic case was chosen because of its contrast to that case. Tadic was a small-time Bosnian Serb political leader; Blaskic was a General in the Croatian army. If it had been possible, I would have liked to have made some observations at the Rwanda tribunal in Arusha.

The selection of the Sawoniuk and Irving cases as case studies was more opportunist on my part. Yet their appearance at the right time for my thesis was not only a matter of good fortune, since cosmopolitan law is, at this time, enjoying a limited but real renaissance. The Sawoniuk case was the trial of a man who had become a British citizen after the second world war, for crimes committed in Belorus during that war as part of the Nazi genocide of the Jews. The case exemplified many of the complexities and difficulties associated with cosmopolitan criminal trials, such as the fact that the jurisdiction where the trial was taking place was different from that where the crimes were committed; it illustrated very clearly some of the difficulties involved in assigning different kinds of standards and rules which renders evidence admissible or inadmissible and it illustrated some of the ways in which different nationalistic narratives are worked upon by a cosmopolitan court to produce a judgement. The Irving case was a libel trial in which David Irving sued Deborah Lipstadt for calling him a Holocaust denier, a falsifier of history and a neo-Nazi. This case shows another way in which events which may be characterised as crimes against humanity can be examined in a court of law. As well as focusing on the ways in which a trial process can judge between opposing narratives of such events, and produce its own legally authoritative narrative, this case also shed light upon the ways in which the acceptance of certain forms of evidence rather than others can skew the truth which the court or the historian or the witness produces.

The central aim of the empirical investigation was to observe the actual working of these cosmopolitan trials. Much has been written and spoken about international law by media commentators and politicians. The law journals are full of writing by lawyers about the theory of international law. I wanted to observe the social phenomena of cosmopolitan trials as they actually happened. I wanted to look more at how they happened than at how they were supposed, theoretically, to happen. I wanted to come to a judgement not only about whether they could be characterised as fair trials but also about the substance and character of cosmopolitan trials.

I was able to make four trips to the Hague, spending a total of about three months observing proceedings. In the case of the ICTY, live sound (delayed by half an hour) from the three courtrooms is broadcast over the internet; full transcripts are available on the official website of all public proceedings; the judgements which the tribunal produces are of the highest quality, detailed, well written and authoritative. The huge availability of this material is a methodological problem in itself: each day in each courtroom produces something like an 80 page transcript. This is simply an enormous amount of data for a researcher to handle. I still found that being in the building and in the courtrooms themselves gave me an incomparably fuller picture of the institutions and their proceedings. To be able to watch the lawyers, the judges, the witnesses, the defendants, day after day; to be able to see the trial unfold; I found this an absolutely invaluable part of my work. This work of observation was important in enriching the mountains of documentary data available.

I observed the entirety of the Sawoniuk trial at the Old Bailey as well as Sawoniuk's appeal. I observed the entirety of the Irving v Lipstadt case at the Royal

Courts of Justice. Transcripts of these cases would have proved difficult and prohibitively expensive to obtain, and so attendance and note taking was the only way to study them in detail.

One methodological problem in particular stands out in relation to the use of trials in the study of the events which they examine. People, of course, consciously present themselves in a trial in which they are involved in a particular light. Defendants want to be found not guilty; if that is not possible, they want sympathy, and they want the least possible condemnation. Every side in a trial presents a one-sided case. An observer must take care to understand that everything that is said in a trial is said for a particular reason; that nothing is straightforward. It is necessary to be always conscious of the social setting in which the evidence is being presented.

Criminal courts offer one great advantage to the researcher; they are open to the public. However, that part of the working of the criminal justice system which is conducted in public is not necessarily the most important. What happens in jury rooms, and in private conversations between defendants, lawyers and judges can be more telling than what happens in public. These places are much harder for the researcher to penetrate. Many decisions, such as whether there will be a trial at all, whether the defendant will plead guilty or not guilty, are made outside of court; also decisions about the shape that the trial will take, what is agreed upon, what is at issue between the prosecution and the defence; what exactly the jury will be asked to judge; these decisions are made in formal and informal ways, outside of the public court room. It is this process of pre-trial shaping, the off the record pre-trial decision-making, which Baldwin⁸ argues

⁸ Baldwin, J. (2000). 'Research on the criminal courts'. in *Doing Research on Crime and Justice*. R. D. Kin and E. Wincup (Ed). Oxford, Oxford University Press, p. 246

often skews sociological research of criminal justice systems which is carried out by observing public proceedings.

It was true, in my cases, that it was difficult to get access to any sources of information outside of the public proceedings. Attendance in person at the Sawoniuk trial, the only jury trial which I observed, enabled me to be present to observe legal argument which was not held in the presence of the jury and which was not reported in the press. I did attempt to make contact with some of the actors in the cases by hanging around outside and approaching them. The witness at the Sawoniuk case from the War Crimes Unit at New Scotland Yard was as tight lipped and patronising to me outside the court building as he was obsequious to the judge inside it. I was able at the Sawoniuk case, and also at the Hague, to have informal conversations with some of the translators. William Clegg, Sawoniuk's barrister and also Tadic's lawyer at his appeal, finally agreed to give me an interview. In the end, the Tadic appeal was completed a day early and so the interview was conducted in a hotel bar in The Hague in a spare hour before Clegg and his junior had to leave for the airport. I had prepared an unstructured interview schedule and was able to put to him some of the questions which I had planned to. The difference between an unstructured interview with a key informant and a chat in a bar is not necessarily great, but was instructive nevertheless. I also wrote to the Crown Prosecution Service, on the suggestion of Sawoniuk's prosecutor, asking them for copies of some photographs and maps which had been given to the jury. They wrote back offering nothing.

My trial observations were all carried out from the public galleries. At the Old Bailey the public gallery is organised in a particularly cold and rule-bound way; there are

guards to enforce the rules about standing up and sitting down at the correct moments of proceedings; the guards file observers in and out of the public gallery at the beginning and the end of a session; they make sure that no-one has a secret drink or sandwich; they make sure that everyone sits up respectably straight. The system here often has to cope with friends and family of defendants queuing up outside the courtrooms next to friends and family of the victims of rapes and murders as well as sociological researchers, trainee lawyers, homeless people looking for somewhere warm to sit, and simply curious people. At one important session of the Sawoniuk trial, I found myself locked out of proceedings because a group of school children had taken all the places. Perhaps a researcher would get a slightly different view of proceedings from the press gallery; whether it would be actually closer, or would only appear to be closer, I am not sure. The press gallery is inside the building, rather than in a balcony only accessible from outside, as the public gallery is. The public gallery in the Royal Courts of Justice for the Irving case, was less regimented and was much more a part of the courtroom; it did, on the other hand, contain a small collection of Nazi sympathisers, as well as well known historians, Holocaust survivors and students. In The Hague, the public gallery is very close to the court, but is separated from it by sound- and bullet- proof glass, giving an impression of intimacy mixed with an impression of remoteness. Usually at the Hague, the public gallery is almost empty, apart from one or two journalists, and a few observers from the Bosnian or Croatian embassies. As well as being clear about who the observer is and what is being observed, the researcher is also conscious of the place from where the observations are made.

The strength, for a researcher, of choosing a small number of detailed case studies is that it is possible to achieve more depth. I could have attempted a comprehensive survey of all crimes against humanity trials, obtaining information from law reports, press reports, transcripts and other secondary and mediated sources. My aim was different. It was to attempt to get a 'feel' for the cases; to understand the defendants and their crimes; to see exactly how the volumes and treaties and precedents of international human rights law are given life by the particular cosmopolitan institutions and particular lawyers and judges. I did not only want to see that trials take place but I also wanted to see how they take place, how unexpected events are dealt with by the process and how the rules of the institutions of law are worked upon by the individual agents at work in the process, defendants, lawyers, judges, the press, the public. An immediate relationship between the phenomenon and the researcher requires attendance in court. The researcher makes sense of their own observations first, before being subjected to the opinions of others and the shape given to events by the media.

I did not observe these trials innocently. I did not go to any great lengths to attempt to create some sort of scientific distance from events, that is, to hide my particularity as an observer and as a social agent behind a façade of artificial objectivity. In fact, I observed the trials with all the prejudice that the experience of my life gives me. Observation is not only created by that which is being observed; it is also created by the observer. It is necessary to keep in mind the social context of the observation as well as the object. It is necessary to retain some picture of who is observing, and of the interaction between the observer and the observed. The difference between the information that is available when you are an observer in court and that which is available

even from a complete transcript is impressions of people and events which are filtered through one's own personal experience and also impressions of structures and people and events outside of the formal proceedings of the institution. I will give three examples to illustrate what I mean.

There was an incident, which I describe in the text, when I was at the Hague tribunal and was approached by the chief security officer and interviewed by him. I was, at the time, outside the building, sitting on the grass in the sunshine at lunchtime. He approached me in order to ask me why I had been trying to engage members of staff in conversation, what I was observing, and who I was. I was surprised by the extent and the manner of the security. The incident added, in a small way, to my impression of the institution as a whole. It bolstered a feeling I had that the institution took itself seriously but in a civilised sort of way. It was interesting that he chose an informal interview outside of his 'territory' rather than in his (perhaps rather intimidating) office. It was interesting that he had a Northern Irish accent, which I happened to recognise; other researchers may have recognised other things which I failed to notice at all.

And the significance of his Northern Irish accent? In the privacy of my own head, it seemed significant. I imagined that this chief of security at the cosmopolitan courthouse had previously been some kind of official working for the British state in Northern Ireland. This, perhaps, was something that indicated to me the seriousness of the security. On the other hand, I had noticed many of the tough-looking law-enforcement and security individuals around the building and I thought that it was nice to see them involved in the real pursuit of justice, rather than the kinds of pursuits that security and police types are often involved in. It occurred to me that it was nice that this

rather friendly Northern Irish security chief was occupied doing something on the side of human rights rather than against human rights. I am aware of course, that this may all be fiction; nothing more than the strange prejudices of someone who was politically formed on the British Left. It does, however, seem to me, to be one of the kinds of ways that we get a 'feel' for the world around us.

When I saw, in court, a video of David Irving addressing an American Nazi meeting it became clear to me, immediately, that Irving was a Nazi. It was clear to me, because he was addressing the meeting as a 'comrade', as one of them. I have been to many meetings which have been addressed by 'comrades'. I recognised it in the case of David Irving because I had seen it, or something similar, often before. Again, something from my own particular experience gave me a certain insight which I would not have had from transcripts or from reports. It was not hard fact which it gave me, it was not evidence, just an impression. But it was one which felt valuable to me.

When I first saw Ben-Zion Blustein giving evidence against Sawoniuk, I was struck by his similarity to other Holocaust survivors who I had seen and met. In the text, I say that Blustein struck me as a 'typical' Holocaust survivor. I am aware that this statement is rather unscientific, unsociological; it could even be rather offensive. It was, however, an impression, of the kind that I have just been describing, which seemed to me to be valuable, and which was gained only by the methodology of bringing my experience of life to bear. Clearly, I do not rely on my impressions as absolute fact. I, nevertheless, value them as detail and depth to the picture which I am trying to sketch.

In his book about research methodology, Bob Burgess⁹ describes how one researcher illustrated her unstructured interviews with wives of clergymen by drawing on her own experience of being married, at the time, to a clergyman. The same researcher, similarly, brought her experience of having taken her own child to pre-school playgroups to bear when she interviewed young mothers attending playgroups. Experience, empathy and recognition must be important skills for researchers. A methodology which disqualifies such sources of enrichment will produce rather bland research.

I do not write shorthand. When I take notes of trials, I simply do my best to write down as much as I can. Sometimes my notes of what is said are a little confused. Sometimes it is confused in court; sometimes the translation is a little confusing; usually my notes are confusing because I didn't write down everything accurately. Sometimes two questions are elided into one, so there will be an answer to a question that I did not have time to write down. When I quote from my own notes using inverted commas, then that indicates that I am absolutely sure about the exact accuracy of what is in between the commas. When there are no commas, then I am sure of the sense of what was said, but not necessarily the exact words.

It is difficult to know what is the best name to use for the set of events which are often known as *The Holocaust*. *The Holocaust* was a name which emerged only in the 1960's and it accompanied a certain re-emergence of talking and writing about the genocide. It is an unsatisfactory name primarily because of its original meaning, as a burnt offering in ancient religious rituals. It therefore carries with it a sense of holiness and it endows the genocide with a sense of meaning which was in fact absent. A burnt

⁹ Burgess, R. G. (1993). *In the field: an introduction to field research*. London, Routledge.

offering is given in order to please or placate; the genocide was not offered voluntarily nor did it result in anything positive. *The Holocaust* also implies a profound uniqueness with which I am uncomfortable; it is not *a* Holocaust but *the* Holocaust. Having made a good argument for not using this name for the event, I in fact use it often, simply, because it seems to me that it is its usual name. I do not wish to argue about names. I use other names too. *Shoah* is a Hebrew word which translates as violent wind or storm; it also, has attained a status as a common name for the event. *The Nazi genocide of the Jews* is more inoffensive, yet it just sounds technical and clumsy: like a euphemism. I just want to say that when I use different names it is with some awareness that all of the names are unsatisfactory. I do not wish to choose between the unsatisfactory names and I use whichever seems to fit in a particular section of writing.

The term *ethnic cleansing* is often seen in quotation marks because it is a word invented by those who carried out the act in Bosnia. The quotation marks seem necessary because we do not agree that the process involves any kind of genuine cleansing. Yet the term is attractive because of its shocking simplicity. Contained within the term is simultaneously an admission of guilt by those who use it and also a defiant defence of the indefensible. I do not use it in quotation marks since it seems to me to be a word which describes very clearly its referent. Perhaps it is similar to the term *final solution* which Hannah Arendt often used; it is a term invented by the perpetrators to describe simply the process, yet it is one that we can perhaps subvert, somehow, by using it.

CHAPTER 1

THE THEORY OF COSMOPOLITANISM AND INTERNATIONAL LAW

[T]he sovereign territorial state claims, as an integral part of its sovereignty, the right to commit genocide, or engage in genocidal massacres, against people under its rule, and... the UN, for all practical purposes, defends this right.¹

Cosmopolitan law emerges from international law but has a logic which transcends it and which is in contradiction with it. Classically, international law recognises only states as legal personalities. It is the system by which the relationships between states are regulated. It protects the rights of states to be free from the threat of other states. It guarantees the integrity of states, and the right of states to self-determination. Cosmopolitan law, on the other hand, reaches inside states, recognising individuals and other groups as legal personalities. It is primarily concerned with guaranteeing the basic rights of human beings. The problem is that the perpetrators of the greatest human rights violations are likely to be states, or at least social formations which hold state power. So while international law was able to develop according to the principle that each state has absolute sovereignty within its own territory, cosmopolitan law seeks to regulate exactly that domain, the behaviour of states, within their own boundaries, toward the people who live there. The fundamental contradiction is between absolute state sovereignty and human rights. This contradiction has usually been resolved in favour of national sovereignty but there is a contemporary re-emergence of cosmopolitan theory and legal practice which is aiming to resolve it in favour of human rights.

¹ Kuper, L. (1982). *Genocide - Its Political Use in the Twentieth century*. New Haven, Yale University Press, p. 161.

a) National Sovereignty: The development of a remarkably stable and enduring principle

Stephen Neff² argues that the break from traditional natural law theory and its replacement with positive law theory marked the ascendancy of the idea of absolute state sovereignty. Traditional natural law theory held that states were bound by moral considerations when deciding whether to wage war. Augustine wrote about war in terms of justice. He argued that states had a right and in some circumstances, a duty, to take up arms in the defence of justice. Aquinas stressed the point that a just war must be authorised by due authorities, that is, that it be a concern of the public at large, as distinct from a private quarrel. Neutrality, within this framework is a dereliction of duty: if a state stands by and watches another being unjustly conquered, it is morally wrong.³

Positive law generalized private property and freed property owners from traditional obligations and duties. It understood relations between property-owners as ones of equality.⁴ In a parallel shift, governments rejected their moral duties and obligations to each other, and instead openly followed their own self-interests, creating the doctrine of the sovereign equality of nation states. Nation states, like citizens, and property owners, were now all equal before the law. Right replaced duty and ethics.

In the positivist era, argues Neff, the

duty to come to the rescue of victim states was firmly rejected in favour of a right of each state to follow its own national interest as it saw fit - even if it meant standing stonily aloof while neighbouring countries fell prey to aggression.⁵

² Neff, S. C. (1993). "Rescue Across State Boundaries: International Legal Aspects of Rescue" in Menlowe and McCall Smith *The Duty To Rescue - The Jurisprudence of Aid* Dartmouth Publishing Co. Ltd. Aldershot.

³ Neff (1993), p. 162.

⁴ Fine, B. (1984). *Democracy and The Rule of Law*. London, Pluto.

⁵ Neff (1993) p. 160.

Ideas of just wars and of good and evil were replaced by an international parallel of Adam Smith's enlightened self-interest doctrine. While this shift from natural to positive law remains within the realm of states, and their rights and responsibilities in relation to each other, it is significant because it sees the replacement of ethical considerations, however inadequate they may have been, by considerations only of interest and power.

Elizabeth Zoller⁶ argues that the rise of the modern state and its associated modern sovereignty put an end to the medieval recognition of the individual as a bearer of international rights and obligations except in cases where it was in the interests of states to hold individuals to account for crimes such as piracy. Thus the 1899 and 1907 *Hague Conventions on the Laws and Customs of War on Land* contracted states to conform to the regulations and to enforce them in accordance with their own internal penal systems: there was no question of any international jurisdiction over the conduct of individuals.

For most of the nineteenth and twentieth centuries, processes of democratization *within* states were not mirrored by parallel processes of democratization *between* states.⁷ Instead, there was the entrenchment of territorial sovereignty in Europe, with each state pursuing their own interests, limited only by the extent of their power.

Held,⁸ following Falk and Cassese, summarises the important points of the model of Westphalia, which encapsulated the principles of relations between sovereign states, as follows:

⁶ Zoller, E. (1990). 'International Criminal Responsibility of Individuals for International Crimes'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands, Martinus Nijhoff. p. 99.

⁷ Held, D. (1995). *Democracy and the Global Order*. Cambridge, Polity Press.

⁸ Held (1995) p. 78.

- 1 The world consists of, and is divided by, sovereign states which recognize no superior authority.
- 2 The processes of law-making, the settlement of disputes and law enforcement are largely in the hands of individual states.
- 3 International law is orientated to the establishment of minimal rules of coexistence; the creation of enduring relationships among states and peoples is an aim, but only to the extent that it allows national political objectives to be met.
- 4 Responsibility for cross-border wrongful acts is a 'private matter' concerning only those affected.
- 5 All states are regarded as equal before the law: legal rules do not take account of asymmetries of power.
- 6 Differences among states are ultimately settled by force; the principle of effective power holds sway. Virtually no legal fetters exist to curb the resort to force; international legal standards afford minimal protection.
- 7 The minimisation of impediments to state freedom is the 'collective' priority.

Held adds that this model covers a period from the Peace of Westphalia in 1648 to 1945, although many of the assumptions underpinning it are still operative in international relations today.⁹ This is a remarkably stable and enduring set of principles. It is an order which recognises, codifies, and legitimises an existing situation of *realpolitik*. This is not simply an order based entirely on an anarchic relationship between powers. International law, treaty, and agreements have had a real existence within this order. But international law was created by agreements between states, and its first principle was always to uphold state sovereignty. When sovereign states have clashed, the Westphalia order has had little to say other than that this was a 'private' matter between them; when sovereign states have turned against their own citizens, it has had even less to say.

Following the first world war, and the collapse of the Ottoman and Austro-Hungarian empires, the system of independent, sovereign nation states was greatly expanded by the victorious powers in Europe. Giddens¹⁰ argues that the external

⁹ Held (1995) p. 78.

¹⁰ Giddens, A. (1985). *The Nation State and Violence*. London, Polity.

influence of the international system of nation states played an important role in the generalization of the sovereign nation state model. The international system of nation states required the universalisation of national sovereignty, exercised through the rapid proliferation of surveillance within territories and reflexive monitoring between states. Developments as mundane as international postal services required the existence of national postal organisations which had full reach within their territories. Sovereign control of the means of mass violence and the industrialisation and totalisation of war strengthened the detailed control of territory and information which national states were developing. Territorial definitions and the sovereignty of borders policed according to inter-national agreements similarly increased the necessity for internal surveillance by states. The influence of the international system of nation states and the requirement for international co-operation were, according to Giddens, centrally important in the consolidation and generalisation of the doctrine, the reality and the myth of national sovereignty.

The great powers and the League of Nations oversaw the rapid expansion of the system of state-national sovereignty in eastern and central Europe following the first world war in order to fill the vacuum left by the two defeated empires. It was the failure of the new nation states to guarantee the most basic human rights of many millions of people who lived within them which Hannah Arendt¹¹ sees as a central origin of totalitarianism and from which she constructs a persuasive argument for the necessity of a cosmopolitanism which can address the central contradictions present within the doctrine of absolute national sovereignty. I will return to her argument later in this chapter.

¹¹ Arendt, H. *The Origins of Totalitarianism* (1975) San Diego, Harvest.

The foundation of the United Nations, which followed the second world war did little to undermine the centrality of the doctrine of absolute national sovereignty which was at the heart of international law and international relations. Article 2 (4) of the UN charter states that

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹²

It is easy to see that the prohibition of the use of force by one state against another was a principle which needed re-stating and emphasising in the post-war world. Invasion and occupation of a sovereign state was already, and was more clearly now, against international law; was perhaps, the most serious and clear contravention of international law. But there is a tacit assumption which lies behind this principle: there must be some sense in which the state is seen to represent the people who live within the territory of that state. This is why invasion and occupation is undesirable. The principle of self-determination holds that the people of a territory have the right to determine their own destiny free from external intervention. So what kind of relationship is assumed to exist between the state and the citizens?

There are very clear and agreed precedents and principles laid down in international law concerning the recognition of states and of governments by other states, governments and international bodies. Emphatically, it is not a democratic representative structure which bestows international legitimacy on a government or a state. At the heart of the criteria for international recognition is a *realpolitik* acceptance that a regime which *de facto* holds state power, and controls a territory, will in the end be recognised

¹²

UN Charter, UN website (2000),
<http://www.un.org/aboutun/charter/index.html>, Chapter 1, Article 2 (4)

internationally. There is no requirement for a state or a government to represent its citizens. But, if the prohibition of the use of force by states against other states is to contain a democratic content, if it is, as it appears to be, a principle which is good for the people who live in a state, then there must be some assumption of representation. It is not an assumption of democracy, just an assumption that there is some sense in which those who hold state power represent the people who live in their state. But the problem with this assumption of representation, however tenuous the actual representation may be seen to be, comes where groups of people are actively excluded from citizenship by those in state power. For example, in what sense were the Kosovars represented by 'their' Yugoslavian state in 1999? In what sense were Kurds in Halebja represented by 'their' Iraqi state in 1989? In these situations, where the state is actively killing and ethnically cleansing people who live within its own territory, the assumption behind the principle prohibiting the use of force against a sovereign territory can be seen to break down. There is, as we shall see when we examine the work of Hannah Arendt, a crucial difference between the right of a nation to self-determination and the right of a state to self-determination. When the state is the property of a nation, or a ruling clique, when there is not even the most tenuous representative link between the citizens as a whole and the state, then the state's right to freedom from external intervention can in fact constitute a right to commit genocide or ethnic cleansing.

However, Article 2 (7) of the UN charter emphasises the inviolability of the sovereign state, extending its legal protection against intervention by other states to the UN itself:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any

state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹³

And Chapter VII appears to offer little hope for people to expect protection from ‘their own states’. Article 32 in that chapter states that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken ... to maintain or restore international peace and security.¹⁴

Chapter VII seems to offer some possibility that the Security Council may authorise the use of force against a sovereign state, but the charter is careful to emphasise that this should only be done “to maintain or restore international peace and security”. So if other sovereign states are at risk there is the possibility of intervention; emphatically not, if the only risk is to the internal population of the state.

It must be emphasised here that while these passages from the UN charter do make a *prima facie* case for the illegality of, for example, humanitarian intervention, as do other principles of international law, they are open to interpretation and are sometimes balanced by opposite principles. It is not my case that these represent the final word on what international law ‘says’ about these issues; rather, that they indicate the centrality of the principle of absolute state sovereignty both in classical international law and in the foundation of the UN. In fact, as will be seen later, the passage about the Security Council’s responsibility to ensure international peace and security were used to legitimate the foundation of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda. There is much creative work being done by international lawyers and by international

¹³ UN Charter, UN website (2000),
<http://www.un.org/aboutun/charter/index.html>, Chapter 1, Article 2 (7).

¹⁴ UN Charter, UN website (2000),

institutions to strengthen the weight assigned to human rights law in relation to, for example, the rights of states. Law, especially international law, is never simply a static body of given rules, it is rather a dynamic system of authoritative decision-making.¹⁵

The dominant current within International Relations, which emerged in the post war period as an academic discipline, developed very much along the lines of the Westphalian model. It has always been dominated by ‘realism’ – the theory that state action is to be understood as the pursuit of interest defined in terms of power, and that international outcomes reflect the struggle for power. International order is based on power counteracting power, forming a balance of power equilibrium. IR was always sceptical of the institutional reform of international organisations in order to create more stable or just outcomes. Brown¹⁶ argues that the reason for this common commitment to the essentials of ‘realism’ lies in the pre-disciplinary, foundational experience of IR, the collapse of international order in the 1930’s. As an organised academic discipline, it was founded upon the destruction of the reformist discourse of the 1930’s. IR held that western liberal democracies did not wage aggressive war and therefore the liberal conscience need not be troubled too much by its apparent endorsement of war. When America did wage aggressive war in Vietnam, IR began to lose its self-confidence and its popularity.

Throughout the twentieth century there has been a sizable current on the left as well as on the right which has accepted the *realpolitik* of absolute national sovereignty. Under the slogan ‘bourgeois democracy for nations’, Lenin argued for the principle of

¹⁵ <http://www.un.org/aboutun/charter/index.html>, Chapter 7, Article 32
Higgins, R. (1999). *Problems and Process: International Law and How We Use It*.
 Oxford, Oxford University Press.

national sovereignty against imperialist domination. After Lenin the internationalism of some of the left dissolved into a greater Russian nationalism, support for Russia as the universal nation¹⁷, the nation whose interests coincided with the interests of the international working class. There has been an acceptance amongst sections of the left that international relations and also human rights were simply matters of power. The realism of power politics was preferred to bourgeois liberal utopian projects of regulation and law.

b) Cosmopolitanism: The doctrine of absolute national sovereignty begins to break down

The aftermath of the second world war and the Nazi genocide of the Jews saw the re-birth of the idea of cosmopolitanism and the birth of cosmopolitan law. The Nuremberg trials established the precedent of international criminal tribunals and invented the new offence of crimes against humanity. The Genocide Convention was agreed in 1948 and outlawed that new offence. Both of these crimes were subject to universal jurisdiction, meaning that any state had the right to arrest and try suspects irrespective of where the crimes were committed. This brief but vigorous bloom of cosmopolitanism, however was short lived, and quickly withered under the freeze of the cold war. Yet at the moment of the end of the cold war it vigorously re-emerged.

In the United States, President Harry S Truman requested the Senate's advice on and consent to the ratification of the Genocide Convention in 1949, but it was only in

¹⁶ **Brown, C.** (1998). *Justice and International Order*. UK Association for Legal and Social Philosophy 25th Annual Conference, Reading.

February 1989 that ratification was completed and it became binding upon the US.¹⁸ The Senate spent 40 years debating the issue, asserting the primacy of US sovereignty and the constitution over international law and the International Court of Justice, and putting forward possible *reservations* and *understandings* which would accompany and clarify ratification. The US was reluctant to allow its sovereignty to be limited, even in the case of genocide. The Genocide Convention was passed immediately before the start of the cold war and was only finally ratified by the US at its very death. This post cold war period also saw the setting up of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda. Social theorists such as David Held¹⁹, Robert Fine²⁰ and Jürgen Habermas²¹ developed theories of cosmopolitanism which were intended to come to terms with the increasingly apparent failure of nationalist frameworks to guarantee human rights.

The term ‘cosmopolitan’, referring to the ideal of human beings as rational creatures bearing universal rights as citizens of the ‘cosmopolis’, can be traced back to the ancient Greeks. It was also used commonly in pre-industrial Europe to refer to a political or cultural universalism which challenged both the particularity of nations and states and also the pretensions of religious universalism.²² Kant developed the concept and argued for a system of cosmopolitan law.²³ He saw that the creation of democratic

¹⁷ Fine, R. (2001). *Political Investigations: Hegel, Marx, Arendt*. London, Routledge.

¹⁸ Le Blanc, L. J. (1991). *The United States and the Genocide Convention*. Durham and London, Duke University Press, p. 2.

¹⁹ Held, D. (1995). *Democracy and the Global Order*. Cambridge, Polity Press.

²⁰ Fine, R. (1994). “The ‘New Nationalism’ and Democracy: A Critique of Pro Patria.” *Democratisation* 1(3): 423-443; Fine, R. (2001). *Political Investigations: Hegel, Marx, Arendt*. London, Routledge.

²¹ Habermas, Jürgen. (1994). “Human rights and popular sovereignty: liberal and republican versions.” *Ratio Juris* 7(1): 1 - 13.

²² Held (1995) p. 227.

²³ Bohman, J. and Lutz-Bachmann, M. (1997) *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. Cambridge Mass, MIT Press.

republics both required and made possible a supra-national structure which could prevent war and which could protect the rights of the traveler in a foreign country.

Cosmopolitan law, thus understood, transcends the particular claims of nations and states and extends to all in the 'universal community'. It connotes a right and duty which must be accepted if people are to learn to tolerate one another's company and to coexist peacefully.²⁴

Central to Kant's conception of cosmopolitan law was a democratic, universal content. Cosmopolitan law could only be a framework which enshrined the principles of mutual recognition and tolerance. As Held argues, "[t]he condition of universal hospitality, or, as I would rather put it, of a cosmopolitan orientation, is a cosmopolitan democratic public law."²⁵ Kant's vision was of an international confederation of democratic republics: an international order which regulated more than just the relationships between the republics but which also set down minimum standards of human rights, not just for citizens of states, but also simply for citizens of the cosmopolis.

²⁴ Held (1995) p. 228.

²⁵ Held (1995) p. 229.

c) Hannah Arendt: Beyond the nation state

A central theme in Hannah Arendt's analysis of *The Origins of Totalitarianism* is the problem of the national state's inability to guarantee a framework of rights for all. She discusses the development of exclusive ethnic nationalism which subverted the classical model of the all-inclusive, civic, nation state following the first world war in Eastern and Central Europe. She sees the totalitarian movements themselves, both Stalinist and Nazi, as ones which refuse to be contained within the confines of the nation state, which both ideologically and militarily transcend its parochial boundaries. In her analysis, totalitarianism is first of all a critique of, rather than an extreme form, of nationalism. And she argues that the response to totalitarianism also, necessarily, broke out of the constraints of nationalism, with the development of the offence of crimes against humanity and cosmopolitan criminal legal structures.²⁶

All over Europe, following the first world war, and particularly in the defeated countries, people's lives fell apart, followed by their conception of the world in which they lived. Soldiers had witnessed slaughter and experienced bloodshed and terror in the trenches. The middle classes were threatened with economic and social ruin. The working classes were faced with chronic unemployment.

[T]he explosion of 1914 and its severe consequences of instability had sufficiently shattered the facade of Europe's political system to lay bare its hidden frame. Such visible exposures were the sufferings of more and more groups of people to whom suddenly the rules of the world around them had ceased to apply.²⁷

²⁶ Arendt, H. (1994). *Eichmann in Jerusalem - A Report on the Banality of Evil*. Harmondsworth, Penguin.

²⁷ Arendt (1975) p. 267.

Arendt focuses on another section of Europe's population who suffered in a sense more profoundly. The break-up of the great multinational empires led to an all-out struggle between nationalities and minorities for some kind of favourable political settlement. The disappearance of the imperial state machines robbed these subject nations and minorities of even a solidarity born out of facing a common enemy.

There developed many struggles between national and ethnic groups for power: Slovaks against Czechs, Croats against Serbs, Ukrainians against Poles, everyone against Jews. Human rights became increasingly dependent on national rights, which could only be won at the expense of the rights of others. Arendt argues that the settlements which the victorious powers tried to impose through the League of Nations were arbitrary and utopian. Rather than solidifying a peace, they encouraged and accelerated the process of competition between national and ethnic groups for independence and hegemony. The Settlements created four distinct categories of people: *state peoples*, those nationalities which were granted their own states; *equal partners*: those nationalities like Slovaks in Czechoslovakia or the Croats and Slovenes in Yugoslavia who were meant to be equal in government but were not in fact; *minorities* those peoples, sometimes officially recognised by Treaties, to whom states were not conceded (like the Jews and Armenians); and finally *stateless peoples* who had no governments to represent them and therefore lived under conditions of lawlessness.

Arendt estimates that a hundred million people were formally recognised as *minorities*. They were the ones, she argues, who were given paper guarantees to protect their rights, rather than states. The great powers wrote these guarantees into the treaties with little intention of enforcing them. The fate of the 'minorities' was often to be

excluded from citizenship of the states in which they lived, either in law, or simply in practice. Ten million people did not even qualify as *minorities*, did not even attain any formal rights, but became stateless, people with no citizenship at all. These people did not merely lose their homes and their rights to earn a living; they lost their very recognition as human beings, as people with any rights - they lost the protection of any law. These are people who would gain rights if they committed a crime; the right to a trial; the right to representation; the right to know how long their sentence was to be. But they had committed no crimes; they were simply outside of any state, and therefore outside of any law. They could be imprisoned, deported to somewhere else, deported back again, with no possibility of appeal to any state machinery.

Everyone became convinced, as Arendt put it, that

[t]rue freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation, that people without their own national government were deprived of human rights.²⁸

This conviction was fostered among the so-called *minorities* by their distrust of the League of Nations as a body composed of nation state representatives who identified with the *state peoples* and who defined Minorities Treaties in terms of the duties owed by the minority peoples to their 'hosts'. Even the treaties guaranteeing the rights of minorities had the effect of endorsing the fact that only nationals, people of the same so-called national origin, could be full citizens and enjoy full rights; and that persons of different 'nationality' needed some law of exception.²⁹

²⁸ Arendt (1975) p. 272.

²⁹ Fine, Robert. (1994). "The 'New Nationalism' and Democracy: A Critique of Pro Patria." *Democratisation* 1(3): 423-443.

The appeal to human rights became increasingly one only resorted to if all other rights were out of reach; if one was denied rights as a citizen of a nation, or as a property owner, or even as a legal subject, then all that was left was one's rights as a human being.

...the transformation of the state from an instrument of law into an instrument of the nation had been completed³⁰

This whole process, which may be characterised as a “regression from civic to ethnic nationalism”³¹ was to help shape the whole future of Europe. The balance of the nation state was shifted from the state to the nation, from a juridic mode, in which the state defines the nation as a community of citizens with political rights, into an ethnic mode, in which the nation, defined ethnically, determines the state and therefore who has citizenship within it. The Rights of Man were dependent on common citizenship, a situation to which the nation state could no longer even formally approximate.

Even from the beginning of the Rights of Man discourse, these individual rights to which every human was entitled simply by the fact that they were human, were connected to the right of the people to sovereign self-government. This sovereign was the guarantor of these rights. Arendt sums up the perplexities of the rights of man as follows:

man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people.³²

The French revolution coupled the Rights of Man to the nation state not just in theory but in reality. Now, freedom became the right of your nation to self-determination, rather than any abstract notion of individual rights.

³⁰ Arendt (1975) p. 275.

³¹ Fine (1994).

³² Arendt (1975) p. 291.

The Nazis seized upon this re-definition of the nation state, eventually declaring that citizenship of the Reich was dependent upon possession of the correct 'blood'. It worked in another way as well. A state which considers certain people to be unworthy of citizenship, could actually make them appear to the world as such. Arendt quotes the official SS newspaper in 1938: "If the world is not yet convinced that the Jews are the scum of the earth, it soon will be when unidentifiable beggars, without nationality, without money, and without passports cross their frontiers".³³ The plight of this scum is "not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them".³⁴

The corruption of the civic principle of nationalism into an ethnically exclusive reality prepares the ground for the formulation of supra-national solutions. The Nazis themselves understood this possibility. While they were happy to use the rhetoric of nationalism, their project was not simply one for the German '*Volk*', it was one for the whole world. Its starting point was an understanding that old style national politics was increasingly unable to deliver what it promised.

The approach that Arendt began to develop was a cosmopolitan one. The nation state could not guarantee the rights of its citizens, and the unbounded perpetually destructive ideological madness of Nazism certainly could not. One logic of Arendt's cosmopolitanism was to tie the idea of universal human rights to a cosmopolitan legal structure which could give it some concrete reality. The appeal to human rights had become a sign of absolute desperation, since it was only resorted to if one had no rights as a citizen, or a member of a people or of an ethnic group. If there was a structure above

³³ Arendt (1975) p. 269.

³⁴ Arendt (1975) p. 296.

that of the state which could begin to offer the *de facto* stateless some kind of protection, then this would also begin to undercut the perceived necessity of ethnic nationalism itself. The need of every ethnic or national group to carve out ‘their own’ nation state would be diminished if there was a structure which guaranteed them the most basic conditions of life even without ‘their own’ state to protect them.

d) David Held’s Cosmopolitanism: A new world order or castles in the sky?

Held³⁵ points to the sets of processes which are often referred to as *globalization* – the ever increasing growth and complexity of interconnections and interrelations which exist across national boundaries; the growth of multinational companies and trade, communication and cultural networks; the movement of populations and the growth of diasporas. He sees the growth of problems which have no respect for national boundaries such as dangers posed to the global environment like acid rain, the greenhouse effect and the depletion of the ozone layer. He points also, to the growth of racism and the spread of ethnic and political separatism in many parts of the world and the not entirely reliable equilibrium provided by the proliferation of military technologies and arms. He argues that while problems encountered by democratic theory within national communities have been widely noticed and discussed, democratic theory has not addressed the challenges of globalisation and has not seriously questioned the centrality of the nation state to democratic politics. The rapid growth and importance of aspects of life which transcend national borders raises, for Held, a problem of democratic accountability. Life is

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Held (1995).

becoming more cosmopolitan and inter-connected; many structures of power which have increasingly important effects on our lives are developing outside of national frameworks and so the central question is how to re-think democracy so that the new supra-national structures of power are brought under some form of democratic control.

At issue is rethinking the nature, form and content of democratic politics in the face of complex intermeshing of local, national and global relations and processes.³⁶

Held re-works the concept of sovereignty, creating a layered theory. Sovereignty becomes sited on different levels, local, regional, national, global. Also, there are other dimensions to power, not simply geographical, but also political, economic and cultural. What is necessary to bind the disparate sites of power and sovereignty into a democratic framework is an agreed set of minimum principles. Democracy, argues Held,

entails a commitment to what I call the ‘principle of autonomy’ and a set of ‘empowering rights and obligations’ – rights and obligations which must cut across all those sites of power, whether rooted in politics, economics or culture, which can erode or undercut autonomy, for individuals and groups. Such a principle and set of rights and obligations create the possibility of ... a ‘common structure of political action’. Such a structure... needs to be entrenched and enforced in a ‘democratic public law’ if it is to be effective as the basis for a fair and circumscribed system of power.³⁷

The reality of the modern world requires that these principles of democracy be re-worked into a system of cosmopolitan democratic law. Held seeks ways of bringing spheres of activity which are currently outside of the control of national democratic processes, such as global financial flows, the debt burden of developing countries, environmental crises, elements of security and defence and new forms of communication, under democratic authority. He wants to see regional and global agencies, such as the European Union and the United Nations rise to the challenge of widening the reach of democratic

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Held (1995) p. ix.

accountability. He also focuses attention on the importance of the development of international organisations and associations, economic institutions and the institutions of international civil society, arguing for their inclusion in the democratic system.

Held sees the first step in this journey as the reform of the United Nations. This process could begin by the UN taking measures to implement, extend and enforce the UN Rights Conventions. The UN could increase its role in the settlement and prevention of inter-state conflict by requiring states to submit to compulsory jurisdiction in the case of disputes falling within the ambit covered by international law and UN resolutions. The institution of an International Criminal Court could play a central role in policing serious violations of human rights. The General Assembly could play a more legislative role if a (near) consensus in that forum was recognised as a legitimate source of international law. The veto arrangements in the Security council could be modified.

Held provides an outline of the ‘cosmopolitan model of democracy’ which he hopes can supersede the old Westphalian model.³⁷ The central principles of this new model are as follows: there is a complex and interconnected global order, delineated both horizontally and vertically, which necessitates cosmopolitan democracy. There is a commitment to the principle of autonomy for different kinds of groups and associations coupled with specific rights and obligations. Cosmopolitan legal principles specify the limits of that autonomy, and there are specified standards laid down for the treatment of all which no regime or group can legitimately violate. These legal principles are to be enforced at various levels and locations, including international courts. Global economic activity must be compatible with the democratic process and structures. Non-coercive

³⁷ Held (1995) p. xi.

³⁸ Held (1995) p. 271.

forms of dispute settlements must be the norm but there must remain a collective right to force in order to protect cosmopolitan law. Citizenship would be extended to membership in all cross-cutting political communities, from the global to the local.

David Held analyses the problem of state sovereignty and power politics in detail. The reality of the world is changing such that it is increasingly diverging, both theoretically and structurally from the existing politics which aims to keep democratic accountability over it. People are increasingly finding that the key networks of power which influence their lives have escaped from their control, and that the powerful have liberated themselves from outdated political arrangements which are increasingly ineffective. A key question which this thesis seeks to address is the degree to which a cosmopolitan global order is becoming a reality, or whether, on the other hand, Held's principles of cosmopolitan democracy in fact constitute little more than a liberal wish-list. It is clear that the problems which Held identifies require the kinds of solutions which he is offering. What is less clear, is whether there is any reason to believe that these kinds of solutions are indeed emerging out of the existing situation, or, whether, on the contrary, the voices calling for cosmopolitan democratic reform are drowned out by the demands of international capitalism and great power politics. It is also possible that those liberal voices are simply being incorporated by the great power(s) as a democratic cover for the usual business of pursuing national interest with all the power that can be mustered.

This work does not focus on cosmopolitanism in general, but on a single manifestation of its development; cosmopolitan criminal law. On the one hand, there are many current developments which demonstrate that cosmopolitan criminal law in relation to crimes against humanity is becoming some sort of a reality. The Nuremberg and

Tokyo tribunals, as well as many national successor trials established the principle of individual criminal responsibility for international crimes, and established the offence of crimes against humanity. They tried and punished many of those guilty of crimes during the second world war. The Genocide Convention and much other international law, such as conventions of human rights and against torture were enshrined as international law. The *ad hoc* tribunals in the Hague and at Arusha are currently, routinely, applying international humanitarian criminal law and punishing some of those who are guilty of its contravention. The indictment of Slobodan Milosevic by the tribunal, at a moment, during the Kosovo conflict in 1999 when perhaps NATO would have preferred it to remain diplomatically silent is a small demonstration of the fact that the tribunals do possess some degree of autonomy in relation to the great powers which allowed them to come into existence. The British courts established the principle that someone like General Pinochet may be arrested anywhere in the world and held accountable for his crimes. The world is groping its way, slowly and cautiously to the institution of the International Criminal Court.

On the other hand, there are many compelling reasons to be cynical. Nuremberg was, in many ways, a fundamentally flawed process of victor's justice. Following the post-war trials and the consolidation of much international human rights law on paper, history since the war has repeatedly demonstrated that power politics over-rides paper law. Even in the former Yugoslavia where perhaps the most progress has been made, the key criminals are still enjoying their freedom; the legal processes are painfully slow, under-funded and badly publicised. The success of cosmopolitan law here, where it is most successful, is still minimal. And in the former Yugoslavia it happens that the

implementation of law is in the interests of at least some great powers, and not against the interests of the others. Regarding the conflicts in Vietnam, in Tibet, in Chechnya, there seems very little prospect of justice. Henry Kissinger, Vladimir Putin, Jiang Zemin, are not worried when they travel abroad lest they be indicted for crimes against humanity. They have no reason to be worried. International humanitarian law, if it is effective at all seems to be entirely ineffective if it challenges the interests of powerful states.

So, following Arendt, we proceed with our investigation of the present situation and its trajectory, holding the utopian dreams of cosmopolitan law in one hand, and the realist critique in the other. Rather than aiming to choose between these two one-sided frameworks, we look at the existing confused and complex situation. Instead of imagining a smooth and straight progress towards cosmopolitan enlightenment, or a dark and hopeless world dominated only by power, we see a situation containing contradictory fragments of both.

e) International Law Develops Quickly and Boldly

Rosalyn Higgins³⁹ presents two ways of understanding international law. The first is the conception of law simply as a body of rules, which are distillations of accumulated past decisions. The role of lawyers and judges is to find the correct rule for the new situation and apply it impartially. If the role of the authorized decision-maker is other than simply to apply rules, then their decisions could become contaminated from other spheres of life, such as power or social or humanitarian factors. Impartial application of rules, it is thought, is the only way to avoid the use of international legal

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Higgins (1999).

argument as a cover for political ambitions. It is a view which counterpoises authority to power. International law is concerned only with authority and power is counterpoised to, apart from and inimical to that authority. Legal authority is kept clean and uncontaminated by the ambitions of the powerful.

This view – which banishes power to the outer darkness (that is to say, to the province of international relations) – assumes that authority can exist in the total absence of supporting control, or power.⁴⁰

It is the view which was current in association with the old inter-national system of law which developed alongside the Westphalian model of international relations. On the one hand there is the reality of the power politics of sovereign states, and on the other hand, there are the conventions, treaties and homilies to peace which constitute law. Lawyers and legal institutions reacted against the reality of *realpolitik* by attempting to keep international law apart from it. In this understanding, rules are meant to be impartially applied but are in fact frequently ignored. This is because, it is often suggested, of the absence of effective centralized sanctions. International law thus understood, is, in a sense, not law at all, since the rules can be broken by the powerful without fear of sanction. There is a theoretical de-coupling of authority from power, and then an insistence that because genuine power lies elsewhere, then international law is not genuine law since it is also de-coupled from power in reality.

Higgins argues strongly against understanding international law in this way. The authority which characterizes law exists not in a vacuum, but exactly where it intersects with power. Law, far from being authority battling against power, is the interlocking of authority with power. Authority cannot exist in the total absence of control. Of course, there will be particular circumstances when power overrides authority. On such

occasions we will not have decision-making that we can term lawful. But that is not to say that law is about authority only, and not about power too; or that power is definitionally to be regarded as hostile to law. It is an integral element of it.⁴¹

Higgins argues that international law is better understood as a normative system and should not be understood simply as a collection of rules. A system of normative conduct is one in which there is agreement by actors and by the group as a whole about which conduct is obligatory, and an agreement that violation carries a price. The collection of rules is only one part of the normative process. Legal decision-making can move beyond applying existing rules if decisions are made by authorised persons or organs, in appropriate forums and within the framework of certain established practices and norms. International law is the entire continuing process of authoritative decisions making.

This conception of international law which Higgins argues for emphasises the fact that it is concerned with the development of policy for the future in a changing world. It is therefore an essential feature of international law, when conceived in this way, that it is harnessed to the achievement of a core of universally common values. The *rules* view seeks to avoid questions of policy and of values. However, since no application of rules can ever be simply objective and machine-like, and judgement necessarily involves some kind of application of values and policy decisions, the *rules* approach can only seek to disguise such questions as neutral and technical ones. The strength of Higgins' view is that questions of policy and values are brought into the open and are dealt with systematically. This means that

⁴⁰ Higgins (1999) p. 4.

⁴¹ Higgins (1999) p. 4.

all the factors are properly considered and weighed, instead of the decision-maker unconsciously narrowing or selecting what he will take into account in order to reach a decision that he has instinctively predetermined is desirable.⁴²

Law conceived as process then, allows more openness; everyone is entitled to participate in the identification and articulation of what they perceive to be the values to be promoted. The old view that international law is that which an impartial court would say it is if it considered a particular question, is superseded, not least, because there is no such thing as an 'impartial court'. The *process* view allows space for claims and counterclaims, state practice, decisions by a variety of authorized decision-makers, and the use of past decisions and rules to develop appropriate decisions for new situations.

Higgins re-conceptualises what international law is and how it works. Her re-conceptualisation reflects the shift from old static state-bound law to a system which is both more fluid, open and democratic and is also more realistic, ambitious and cosmopolitan. The re-conceptualisation also reflects a shift in international legal practice. The *ad hoc* tribunals, for example, are consciously making law, setting precedents, creating the detailed rules of international criminal procedure; taking best practice from national criminal legal systems and melding them into a new body of international law.

International law itself in reality, and in the way that it is understood by theorists such as Higgins, has already moved a long way from the old static inter-state model. But it is a process in flux. It is a process which may easily be reversed by events. And it is a process which is, as yet, in its infancy.

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Higgins (1999) p. 5.

CHAPTER 2

INDIVIDUAL RESPONSIBILITY AND COSMOPOLITAN LAW¹

Chapters two and three examine two central advances made at the Nuremberg tribunals which followed the second world war. The first, is the establishment of the legal responsibility of individuals for their parts in serious human rights abuses which are committed by large state-like formations. The second is the codification of crimes against humanity and the establishment of universal jurisdiction for such crimes. These two innovations can be seen as the foundational acts of cosmopolitan criminal law. They constitute the subjects of cosmopolitan criminal law in individual perpetrators and individual victims: and they define the scope of cosmopolitan criminal law with the concept of universal jurisdiction.

‘We were only obeying orders’ was not a valid defence at Nuremberg. Article 8 of the charter of the International Military Tribunal said:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility...²

Conversely, for those giving the illegal orders, there was no ‘Acts of State’ defence allowed:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment (Article 7 of the Charter.)

¹ This section is based on **Fine, R. and D. Hirsh** (2000). 'The decision to commit a crime against humanity'. in *Rational Choice Theory: Resisting Colonization*. M. Archer and J. Titter (Ed). London, Routledge.

² **Jackson, Robert H.** *International Conference on Military Trials* (1949) Department of State Publication 3080, Washington D.C., p. 242.

The Tribunal added that a superior order would not serve even as a mitigating factor unless it was given under circumstances that left a defendant with no moral choice but to obey the order.³

The Tribunal established a definite link between individuals and their actions, by treating so-called 'cogs in a murder machine' as perpetrators and refusing the excuse of service to the state. It presupposes that choices are available to the perpetrators of such crimes. If no such choice is in fact available, that is, if the situation is one of 'kill or be killed', then this would constitute a legitimate defence or mitigation.

This insistence on the individual criminal responsibility of perpetrators was one of the most important and far-reaching precedents that were set at Nuremberg. It is a principle that since its establishment at Nuremberg is necessarily at the heart of cosmopolitan criminal law. The Nuremberg precedent has been followed and strengthened by the tribunals for Yugoslavia and Rwanda.

The question I will address in this chapter is how well this legal assumption of choice and responsibility fits with the sociological reality of the ways in which individuals make the decision to commit a crime against humanity. Is the decision to commit such a crime one for which it is reasonable to hold individuals to account?

The prevailing sociological explanation of such decisions in relation to the Nazi genocide is that provided in Zygmunt Bauman's *Modernity and the Holocaust*. Bauman himself may not think of his work precisely in this way, but his basic proposition is that it is the dominance of 'rational choice' over moral response in the modern age that is the key to understanding how ordinary men and women commit such extraordinary crimes.

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Murphy, J. F. (1990). 'Crimes Against Peace at the Nuremberg Trial'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands,

Conversely, the key to overcoming this potentiality is seen to lie in the development of a postmodern ethics which subordinates the imperatives of 'rational choice' to a reconfigured 'moral point of view'. Bauman does not like a world structured around 'rational choice', but he accepts that this is the actuality of our present world and he looks to a way of thinking which overcomes the constraints of 'rational choice' and in its place revives our suppressed capacity to act in a moral rather than rational way. From this perspective, 'rational choice' appears as a form of human decision making which arises in the modern epoch and which has as its consequence the exclusion of ethical concerns. And 'rational choice theory' appears as a form of reified consciousness which hypostasises rational choice as a natural presupposition of social life and blinds us to its historical preconditions and de-moralising consequences.

I am not going to defend rational choice theory against this very sharp line of criticism, but rather to argue that this line of criticism is over-dependent on the rational choice model which it attacks. I want to argue first, that the reduction of 'modernity' to the imperatives of an amoral and instrumental rationality paints a one-sided picture of modernity which obscures the inner connections between modernity and the development of moral consciousness itself; second, that the reduction of reason to instrumental or technical or technological rationality distorts the meaning of reason and severs its connections with thinking, understanding, willing and judgement; third, that the decisions of individuals to participate in crimes against humanity (including those synthesised under the name of the Holocaust) cannot be adequately explained within this framework; and fourth, that the moral point of view itself is far from being a purely innocent or suppressed factor in decisions to commit crimes against humanity. Most of all, although

I recognise that Bauman and those who think like him have undoubtedly revealed something extremely important about the nature of organised violence in the modern age, we must also be alert to the dangers of forcing the empirical phenomena into an over-determined theoretical straightjacket.

i) Modernity and the Holocaust: Bauman's critique of rational choice

In Zygmunt Bauman's conception, the modern world really does run the way rational choice theory says it runs: in terms of short term and instrumental preferences set within a given domain. Every aspect of social life encourages, coerces and impels individuals to act in accordance with their own short-term, narrow, selfish interests. We live according to that 'principle' alone; we do that which we find rational in terms of immediate self-interest. This includes the search for means, obedience to orders and conformity with social norms, regardless of their moral content. It also means the prioritising of self-advancement or self-preservation regardless of moral cost. We become a new type of bourgeois: not the Kantian who thinks and judges for herself but the 'mass man' (to use a phrase borrowed from, among others, Hannah Arendt) who can kill without passion or enmity, simply as a job or in service to the state, because it is an efficient means to a given end or because he is commanded so to do or because that is what everyone else is doing. The making of merely 'rational choices', without regard for ethics, is the very mark of this social type. It is, Bauman argues, through the combination of many such 'rational choices' that the Jews of Europe were rounded up and murdered. As long as we remain within this 'rational' template, we are destined to play our part in the genocide.

The frighteningly domestic image through which Bauman portrays modernity is that of a 'garden culture' in which the extermination of weeds is the necessarily destructive aspect of the gardener's productive and aesthetic vision. A gardener has an image of how he wants his garden to be. He wants it to be well ordered and to conform to his own dreams of beauty and serenity. He likes certain plants and breeds them to fit in with his plan. He does not like other plants, which he designates as weeds and poisons or incinerates. In this scenario, the gardener sees the elements of nature instrumentally, in terms of how they affect him and may be affected by him, rather than as things endowed with an intrinsic value of which he is guardian.⁴ In modernity human beings are themselves stripped of intrinsic value. Some are defined as weeds, others are selectively bred. Genocide is a kind of social weeding, and Hitler and Stalin were but 'the most consistent, uninhibited expressions of the spirit of modernity'.⁵

If the technologisation of conception is one aspect of the spirit of modernity, the other is the technologisation of execution. In this reading of the situation, it was the bureaucracy which executed the Final Solution, and even the 'political master', Hitler, found himself in the position of the 'dilettante' standing opposite the expert and facing the trained official.⁶ There is no *decision*, as such, to commit crimes against humanity, simply the normal functioning of a bureaucratic state. In his discussion of Claude Lanzmann's *Shoah*,⁷ Bauman tells us that 'by far the most shocking among Lanzmann's

⁴ Bauman, Z. (1993). *Modernity and the Holocaust*. Oxford, Polity, pp. 91-2.

⁵ Bauman (1993) p. 93

⁶ Bauman (1993) p. 15. Compare with Alan Bullock: "[Hitler] had a particular and inveterate distrust of experts. He refused to be impressed by the complexity of problems, insisting until it became monotonous that if only the will was there any problem could be solved." Bullock, A. (1983). *Hitler: a study in tyranny*. Harmondsworth, Penguin, p. 381.

⁷ Lanzmann, C. (1985) *Shoah*. A film, Paris, Les Films Aleph.

messages is *the rationality of evil* (or was it the evil of rationality?).⁸ For the bureaucratic form of administration which prevails in modern society has a machine-like quality in which each bureaucrat follows detailed written rules unthinkingly and without responsibility for what the machine is doing as a whole. Bureaucracy is a machine for the exclusion of moral responsibility..

Bauman argues that the defining features of modern bureaucracy were not only well established in Germany during the Holocaust, but made the Holocaust possible. Government was conducted through a centralised, hierarchical and bureaucratic state; respect was afforded to science, knowledge and expertise; rational behaviour was valued over irrational behaviour; the breaking down of tasks into small parts was prevalent; the technology of factories and railways was well established. The Nazi regime appears in this reading as an extreme form of the modern state and the administration which carried out the Holocaust as but an extreme form of modern bureaucracy. Even the choice of extermination ‘was an effect of the earnest effort to find rational solutions to successive “problems”’ and at no point did the Holocaust come in conflict with the principles of rationality:

The ‘Final Solution’ did not clash at any stage with the rational pursuit of efficient, optimal goal-implementation. On the contrary, *it arose out of a genuinely rational concern, and it was generated by bureaucracy true to its form and purpose*⁹.

In Max Weber's exposition of modern bureaucracy, Bauman sees ‘no mechanism ... capable of excluding the possibility of Nazi excesses... nothing that would necessitate the description of the activities of the Nazi state as *excesses*’.¹⁰ If it were the case that

⁸ Bauman (1993) p. 202.

⁹ Bauman (1993) pp. 16-17.

¹⁰ Bauman (1993) p. 10.

modern rational bureaucracy reduces the individual to nothing more than a cog in a machine, a blind applicant of rules, an actor only in the narrowest sense of making rational choices on exclusively instrumental grounds – if all this were true, then we could only conclude with Bauman that the condition of modernity robs people of any significant sense of moral responsibility and that it is this negation of moral responsibility that is the condition of the possibility, as Bauman might put it, of the decision to commit crimes against humanity.

Bauman implies that neither the abstract conceptions of individual responsibility found in law nor the lack of any conception of responsibility in sociology offers a remotely adequate response to the enormity of the issue. Legal notions of individual responsibility are in this context only a legal fiction imposed on a recalcitrant technological reality, and in any event a court is itself a bureaucratic, rule-bound institution which judges questions of criminal guilt by abstracting it from the complex reality of three dimensional events. Putting the blame on a particular individual does little to confront the system of ‘rational choice’, for it is ‘modernity’ rather than individual killers that is primarily at fault. If perpetrators are guilty of not breaking free from this system, this is also the fate of the vast majority of people. Only the few have the courage and vision to risk everything by stepping out of society and confronting their unconditional responsibility for others.

As far as sociology is concerned, Bauman argues that it typically mimics the society which it purports to understand. The general absence of the concept of moral responsibility in sociology, Durkheim’s identification of morality with conformity to social norms, Weber’s rationalisation of bureaucracy, the reification of rational choice by

rational choice theory – all this in effect reflects the conditions of modern society. In opposition to the unheroic ‘mass man’ who succumbs to the pressures and constraints of rational choice, the only way to save ourselves from complicity is to hear the call to Being with Others, the call of alterity, the call to act morally, the call to go beyond the ‘morality-silencing’ bounds of reason and society and rediscover the pre-social sources of ethical life in the face of the other.

ii) Rationality and the Holocaust reconsidered

Two particularly problematic areas in Bauman’s critique of ‘rational choice’ concern his focus on bureaucracy. First, in Weber’s conception of bureaucracy individual officials *are* responsible for their actions and part of the immense power of bureaucracy is based on this responsibility for decision-making and rule interpretation which is distributed throughout the hierarchy. If the Nazi organisation of terror and extermination constituted a typical modern bureaucracy, as Bauman argues, then individuals would have been expected to take responsibility for the tasks assigned to them and the leadership could not have relied on its employees to perpetrate murder simply as ‘cogs in a machine’. As Weber recognised, the process of following a rule is always mediated through mind and consciousness and the *ethos* of public service is the oil that allows the machine to run.¹¹

Second, the social organisations which conceived and executed the Holocaust were so different in both ideology and organisation from the ‘Weberian’ model of

¹¹ Rules are nothing without interpretation. Bureaucracies are machines made up of people, each of whom take decisions within given parameters. Weber writes: ‘a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic administration, that is, either subsumption under norms or a weighing of ends and means.’ - Gerth, H. H. and C. W. Mills, Eds. (1991). *Max*

bureaucracy that they should not rightly be called ‘bureaucracy’ at all. They expressed a mode of rule which inherited elements of bureaucratic authority but reconfigured them in a way that cannot simply be understood in terms of Weber’s analysis of rationality. The Holocaust was neither organised by typically ‘modern formations’ nor by anything approximating an ideal Weberian bureaucracy.

Certainly, the analysis of totalitarianism in power offered, notably, by Hannah Arendt (in *The Origins of Totalitarianism*) and Franz Neumann (in *Behemoth*) paints a profoundly different picture of totalitarian rule. Totalitarianism was not final culmination of the power of the modern state, but a revolution against the structures of the modern state. Movement rather than structure was its essence. Totalitarian rule was organised on the basis of the intermeshing of various state and party institutions and the proliferation of organisations within the party. Duplication was particularly apparent within the many police apparatuses which all did similar work, spying on the population and on each other, without any clear knowledge of who would be rewarded and who would be purged.¹² In the complex duplication of organisations involved in the Final Solution, all were ‘equal with respect to each other and no one belonging to one group owed obedience to a superior officer of another’.¹³ The only ‘rule’ according to the

¹² *Weber - Essays in Sociology*. London, Routledge, p. 220
See also Alan Bullock: ‘There was always more than one office operating in any field. A dozen different agencies quarrelled over the direction of propaganda, of economic policy, and the intelligence services. Before 1938 Hitler continually went behind the back of the Foreign Office to make use of Ribbentrop’s special bureau or to get information through Party channels. The dualism of Party and State organisations, each with one or more divisions for the same function, was deliberate. In the end this reduced efficiency, but it strengthened Hitler’s position by allowing him to play off one department against another.’ Bullock, (1983), p.381

¹³ Arendt (1994) p. 71 - In September 1939, the Security Service of the S.S., a party organisation, was fused with the regular Security Police of the State, which included the Gestapo, to form the Head Office for Reich Security (R.S.H.A), commanded by Heydrich. The R.S.H.A. was one of twelve Head Offices in the S.S., two others of which were the Head Office of the Order Police, which was responsible for rounding up Jews, and the Head Office for Administration and Economy (W.V.H.A.) which ran concentration camps and later the “economic” side of

Führerprinzip was that formulated by Hans Frank: ‘Act in such a way as the Führer, if he knew your action, would approve it’.¹⁴ This ‘categorical imperative’ is the opposite of clear, rational, written rules. The ‘leader principle’ is not that of a bureaucracy organised on the basis of formal rules within a structured hierarchy, for the allegiance of the official is not owed to his or her immediate superior but to the leader himself.

The individual responsibility of the official is arguably even greater under the leader principle than in a regulated hierarchical bureaucracy in which responsibility and authority are distributed according to plan. On the one hand, to grasp the will of the Führer demands zeal and creativity far in excess of the old-fashioned plodding bureaucrat; and wide latitude is given to sub-leaders for the execution of policies. On the other hand, each holder of position is held responsible for all the activities of his subordinates, even in cases of disobedience and failure. The perpetrators were not generally forced into the formations which implemented the Holocaust. Eichmann was keen to win promotion on his particular ‘front line’ and the members of the murderous police battalions (the *Einsatzgruppen*) were given the opportunity to withdraw from the killing actions.¹⁵ When they accepted the authority of these outfits, they chose to do so even if the parameters of their choices were limited.

Authority in the modern sense of the term is not the same as power. People choose to defer to authority. To be sure, choices are never completely free; they are made within the limits of what is possible and of what alternatives are possible; there are

extermination. The R.S.H.A. contained Section IV, the Gestapo, divided into Section IV-A, dealing with “opponents” and Section IV- B, dealing with “sects”. The Higher S.S. and Police Leaders were in a different command structure to the twelve offices of the R.S.H.A., while the *Einsatzgruppen* were under the command of the R.S.H.A., but were not one of the twelve offices.

¹⁴ Arendt (1994), p.70.

¹⁵ Arendt (1994) p. 11.

Browning, C. (1993). *Ordinary Men*, New York, Harper Collins.

always external constraints; yet rarely are those constraints so rigid that there is no choice; rarely is the structure so dominating that it removes all agency. Under the leader principle, authority works through the will of every member to know and act in accordance with the will of the leader and to take responsibility for all the decisions taken in their field of operation. Bauman was right to tie his analysis of responsibility to the actual ways in which decision making was organised in the planning and execution of the Holocaust, that is, not to remain exclusively at the level of political philosophy or legal theory but to link such concerns with a sociology of decision making. However, the presumption of rationality in the substance of his analysis obliterates what Arendt called 'the horrible originality' of totalitarian rule.

It is commonly noticed about the Holocaust that one of its most striking features was its industrialisation of death. The Holocaust was of its time, it used the methods of its time and particularly important to Bauman are the methods of modern management through which the genocide was in part carried out. We say 'in part' lest the 'industrial' image of Auschwitz overtake our imagination of the Holocaust as a whole. We should remember that the Nazis devised two basic strategies for the annihilation of Jews: mass shooting and mass gassing. Special duty troops of the SS's Security Service and Security Police, called *Einsatzgruppen*, were assigned to each of the German armies invading the Soviet Union and were given the task of rounding up Jews and killing them through crude and primitive methods of shooting. These methods were the antithesis of Bauman's image of clean and dispassionate white-coated technicians introducing gas into gas-chambers. These were methods which confronted the killers with the blood, face and screams of their victims. It is estimated that some 2 million Jews were murdered in this

way. To murder the rest of European Jewry the Nazis built ‘camps’ with large scale gassing and sometimes crematorium facilities (Auschwitz, Belzec, Chelmo, Majdanek, Sobibor and Treblinka) and many other ‘camps’ which were designed to work their inmates to death. The technology used here was often barely more sophisticated than the brute violence of the *Einsatzgruppen* and it was only when death camps were combined with labour camps (such as at Auschwitz) that architectural relics of ‘industrial killing’ were left behind. All in all about 3.5 million Jews were murdered in this way. A further half a million Jews or so were killed through hunger, disease and exhaustion in the ghettos and as victims of random terror and reprisal. In short, we should be wary of the contemporary synecdoche which substitutes ‘Auschwitz’, or rather an industrialised representation of Auschwitz, for the whole.

Some *elements* of bureaucracy certainly existed in the Third Reich: people were sometimes numbered, processed by bureaucratic-type machines, placed under systems of surveillance; there were papers, form filling, official stamps and files of information kept on individuals. But there was no bureaucratic hierarchy of command or system of rules that would be recognisable to a student of Weber. Officials who were technically in positions of authority could be denounced and replaced by their juniors; one apparatus was liable to be liquidated in favour of another; the stability and hierarchy of genuine bureaucracy were absent. What was most significant about the execution of the Holocaust was not the presence of bureaucratic authority but rather the *reconfiguration* of these elements to construct a principle of rule such as the world had not experienced before.

When Bauman turns rational choice into a modern fatality, he also reduces it to its basest elements. He declares that ‘most scientists would be prepared in exchange [for research grants] ... to make do with the sudden disappearance of some of their colleagues with the wrong shape of nose or biographical entry’.¹⁶ He says that rational individuals would play their part in gassing millions, if it meant holding on to a good job. The rational individual would look the other way, stand by and refrain from intervening into affairs that were none of his business, that were not in his job description. This is not the individual who would devote her life to making sense of the world in all its boiling complexity. The shame we feel when we live in a world in which the Holocaust has happened is represented as the antithesis of reason. It is as if morality and reason are opposed armies or that the opposition of morality and reason which Bauman discerns under Nazism is true of modernity itself.

Bauman also totalises rational choice to explain the behaviour of those who conceived the genocide, those who organised it, those who perpetrated it and those who stood by without intervening. And the same mechanism also appears to have governed the behaviour of the victims:

The Jews could... play into the hands of their oppressors, facilitate their task, bring closer their own perdition, while guided in their action by the rationally interpreted purpose of survival.¹⁷

Bauman argues that the regime in power is always in control of the ‘game’ in such a way that the ‘rational choice’ from the point of view of the subordinates is also the preferred choice from the point of view of the regime. So it was that the Jewish administrators and police of the Ghettos were enticed to co-operate with the Nazis in the deportation of Jews

¹⁶ Bauman (1993) p. 109.

¹⁷ Bauman (1993) p. 122.

on the ground that, however many Jews they produced, they were saving or at least delaying the transport of the rest. The Nazis were able to rely on the Jews to act 'rationally' and thus collaborate in their own extermination:

'In [the world of Auschwitz], obedience was rational; rationality was obedience... Rational people will go quietly, meekly, joyously into a gas chamber, if only they are allowed to believe it is a bathroom....'¹⁸

Here the 'rationality' of the Jewish response which looked to make an accommodation with the Nazis is contrasted with the 'irrationality' of the Warsaw Ghetto uprising. But the choice was not between unreason and reason. We may prefer the heroism of the Warsaw Ghetto uprising to the conformity of the Jewish councils, but in both cases Jews were faced with an impossible choice. The accommodation strategy seemed reasonable to a conservative Jewish leadership who understood the Nazi threat as a continuation of an age-old antisemitism with which a *modus vivendi* could eventually be found. It was an attempt to give a little in order to save more. The 'rebellion' strategy adopted in Warsaw seemed reasonable when it became clear that the Nazis planned to kill everyone and that there was no exit. It does not increase our understanding of events to assign the epithet of 'rational' to one strategy and 'ethical' to the other.

There can be two interpretations of Bauman's overall thesis. The *weak* one may be summed up by his observation that 'modern civilisation was not the Holocaust's *sufficient* condition; it was, however, most certainly its *necessary* condition'.¹⁹ This interpretation brings to the fore the fact that the Holocaust was modern both in its conception and execution and that the conventional view of Nazism as simply 'anti-

¹⁸ Bauman (1993) p. 203. He adds: ...[T]here are no scientific methods to decide whether the well-off residents of the Warsaw ghetto could have done more to alleviate the lot of the poor dying in the streets of hunger and hypothermia, or whether the German Jews could have rebelled against the deportation of the *Ostjuden*, or the Jews with French citizenship could have done something to

modern' cannot hold. The *strong* interpretation of Bauman's thesis is that the dynamics of modernity push towards genocide, that there is nothing in modernity that pulls away from genocide, that even when genocide is not actual, its potentiality is ever-present. Bauman himself vacillates between these theses but between them there is a lot of ground. The weak thesis reminds us that the Holocaust happened in a 'civilised' European country that was technologically and culturally advanced and cannot be written off as an aberration or just another example of man's inhumanity to man. The strong thesis is that modernity brings us the uncoupling of human beings from moral choice and the tying of human beings to a narrow, short term instrumental rationality. People are made into unthinking cogs in the all-powerful structures of modernity. Bureaucracy brings us the human being who is incapable of seeing the bigger picture. Science brings us 'a rule forbidding the use of teleological vocabulary'.²⁰ Rational choice becomes our fate.

Doubtless the technical-administrative success of the Holocaust was due in part to the skilful utilisation of 'moral sleeping pills' made available by modern science, technology and organisation; but it was also due the skilful use of moral imperatives. The appeal by Nazi leaders to duty over private passion, economic utility and military need is now well established – whether in overcoming the resistance of 'ordinary men' to

¹⁹ prevent incarceration of the 'non-French Jews'. **Bauman** (1993) p. 205.

Bauman (1993) p. 13.

²⁰ **Bauman** (1993) p. 170. Take the case, which Bauman cites, of Dr. Arthur Gütt, the Head of the National Hygiene Department in the Ministry of Interior who argued for selective breeding of human beings. Bauman comments that Gütt had no doubt that the policy he envisaged of 'selection-cum-elimination' was a logical extension, if not culmination, of the advancement of modern science. But Bauman does not discuss whether the theories of Dr Gütt *actually* constituted a logical extension of the work of the celebrated scientists, or indeed whether there was any *scientific* basis whatsoever for his theorising. Gütt and his colleagues may have been recognised by the Nazis as genuine scientists, but that does not mean that we have to accept this recognition. The problem with eugenics was not that it was scientific but that it was not scientific. Bauman seems to accept that Nazi doctors are doctors: that their talk of hygiene, cleansing, blood and

slaughtering other human beings or in overcoming the resistance of army generals to wasting much needed military resources on the killing of Jews. The 'moral point of view' was neither an innocent nor an excluded party in the decision to commit atrocities.

iii) Police battalion 101 and individual responsibility

In his book, *Ordinary Men*²¹, Christopher Browning tells the story of police battalion 101, which was one of the formations which followed the German front as it invaded Russia in 1941 in order to kill the Jews who lived there. The personnel for the battalion was recruited from Hamburg during the war, after the youngest and fittest men, as well as the most politically committed, had already been drafted. Browning explores how these middle aged citizens of Hamburg were transformed into mass killers. In interrogations after the war, the men of battalion 101 identified a number of factors which led them to become killers: the wish to conform, to yield to peer pressure and to obey authority. They told of their desire not to be designated cowardly and not to evade their part in the dirty work that had to be done. Neither political indoctrination nor antisemitism seems to have been a major factor in these decisions.

The first assignment for the battalion was the rounding up of the Jews of Josefov. The men were to be sent to work camps and the women and children were to be shot. The Commander, Wilhelm Trapp, made it clear that no member of his battalion would be compelled to participate in the shootings: about a dozen of the men immediately decided not to take part and others opted out later. However, about four fifths of the men decided to participate. At first they found their task difficult to perform, but Browning argues that

²¹ purification were genuinely within a medical tradition. But this is to take rhetoric at its face value. Browning, C. (1993). *Ordinary Men*, Harper Collins.

there was a 'toughening up' process which hardened the men to killing once they had already taken part. The 'decision' to commit crimes against humanity seems to have followed the first killings rather than to have preceded them. Once these men found themselves implicated in massacres, the group acquired an *esprit de corps* of mutual guilt. As we find recently among perpetrators of atrocities in Bosnia, the group regularly drank large amounts of alcohol in the evenings to 'blank' out their days and avoid having to think about their actions.

The members of Police Battalion 101 seem to fit Bauman's model better than that controversially advanced by Goldhagen:²² that they were driven by an antecedent and virulent antisemitism. They decided to commit crimes against humanity under the influence of the command-structure to which they were subordinated. In private life, they were no more pre-disposed to violence than any other randomly selected group. Yet this genocidal formation was able without much difficulty to incorporate most of them and use them as its agents. There was a role for deference to authority and for the unthinking following of orders. The individuals were explicitly given a choice and most of them made a positive choice to kill. Social factors, such as *esprit de corps*, peer pressure and the wish not to stand out, were all present in the making of these choices. However, the 'hands-on' massacres in which these men participated had nothing to do with social or technological distancing from unseen and faceless victims.²³

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Goldhagen, D. J. (1996). *Hitler's Willing Executioners*. London, Little Brown and Co.

Bauman acknowledges this point. He writes: 'At the *Einsatzgruppen* stage, the rounded-up victims were brought in front of machine guns and killed at point blank range. Though efforts were made to keep the weapons at the longest possible distance from the ditches into which the murdered were to fall, it was exceedingly difficult for the shooters to overlook the connection between shooting and killing.' But Bauman immediately goes on to claim that this was why the administrators of the Holocaust found the methods inefficient and dangerous to morale: 'Other murder techniques were therefore sought – such as would optically separate the killers from their victims. The search was successful and led to the invention of ... gas chambers; the latter ...

There seems to have been some sense in which killing became an adventure for the members of the police battalion. They became caught up in an orgy of drink and violence and togetherness. It was, perhaps, similar to the explanation of Varnado Simpson for his behaviour at My Lai during the Vietnam war. Suffering from post traumatic stress syndrome, he later described the events as follows:

But like I say, after I killed the child, my whole mind just went. It just went. And once you start, it's very easy to keep on. Once you start. The hardest – the part that's hard is to kill, but once you kill, that becomes easier, to kill the next person and the next one and the next one. Because I had no feelings or no emotions or no nothing. No direction. I just killed. It can happen to anyone. Because, see, I wasn't the only one that did it. Hung 'em, you know – all types of ways. Any type of way you could kill someone, that's what they did. And it can happen.²⁴

iv) Adolf Eichmann and individual responsibility

Adolf Eichmann was a key bureaucrat and engineer of the genocide of Jews. He was the man in charge of the whole programme of Jewish extermination. He was not forced into his job. In his case, there was no question of 'kill or be killed'. On the contrary, he was ambitious, keen to win promotion, and personified unquestioning recognition of the authority of the Führer.²⁵ In his trial he said that, though he bore no ill feelings toward his victims, he simply could not have acted otherwise. He acted

reduced the role of the killer to that of the "sanitation officer" (Bauman 1993 p. 26). It seems to me that this account not only misconstrues the order of succession between the face to face and the distanced (what about the 'death marches' at the end of the war?), but also misconstrues the organisation of murder in the camps (as if the executioners did not have face to face contact with those they humiliated, tortured and killed). In the genocide in Rwanda in 1994, a rate of killing which exceeded that accomplished by the Nazis was achieved, using mainly clubs and machetes. In both Rwanda and Bosnia, it was common for perpetrators and victims to be well known to each other. The recent evidence does not show that either technological or social distancing are important factors in perpetrating crimes against humanity.

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Bilton, M. and K. Sim (1992). *Four Hours in My Lai*. London, Penguin. P. 7

Arendt (1970) p. 45.

according to his conscience and that his conscience would have troubled him only if he had questioned orders, a thought which seems never to have occurred to him.²⁶

If we are to believe what Hannah Arendt wrote about him²⁷ he was a rather pedestrian individual, with few motives beyond his diligence in looking out for his own career advancement. He had no ambition to 'to prove a villain' nor was he even a convinced antisemite. He was simply a bureaucrat rooted in an everydayness that made him incapable of critical reflection or moral judgement. It was sheer thoughtlessness which predisposed him to become one of the greatest criminals of the modern age. The lesson Arendt took from Jerusalem is that we have to come to terms with the fact that the man responsible for the execution of the Holocaust was terrifyingly normal: "the deeds were monstrous but the doer ... was quite ordinary, commonplace, and neither demonic nor monstrous".²⁸

Eichmann appears in this account as the very personification of Bauman's 'rational actor' driven by a narrow and petty self-interest to push aside any consideration of the moral substance of the job he did. When he offered the improbable defence that he had nothing to do with the killing of Jews, he seems not so much to have been lying as revealing that "he merely never realised what he was doing".²⁹ Since he conceived himself as a man who was 'only doing his job', acting not out of inclination but only in a professional capacity, he could not regard himself as a murderer. He saw himself merely as a 'cog in a machine' and so he was able to play his role without worrying about the

²⁶ Arendt, (1965).

²⁷ It may be that Arendt was influenced too much by the persona that Eichmann wanted to present at his trial, which was not exactly the 'real' Eichmann. Yet it is exactly the persona which Eichmann presented at the trial which appears to fit so well with Bauman's rational bureaucrat picture. Arendt's picture of Eichmann could easily have been Bauman's inspiration for his account of the genocidal bureaucrat.

²⁸ Arendt (1965) p.3-4.

purpose of the whole machine, or the ethical consequences of its work.. He was an archetype of what Arendt called the ‘mass man’: the new type of bourgeois who presents himself simply as an ‘employee’.³⁰ Eichmann stands at once as the exemplar of the claim that the perpetrators of the Holocaust were ‘men like ourselves’ who merely followed the norms of rational decision making, and as a rejoinder to conventional images of a world dichotomised between our own absolute innocence and the unspeakable Nazi beast. He was living proof of what Jaspers and Arendt termed the ‘banality of evil’: that the perpetrators were endowed more with ‘prosaic triviality’ than with ‘satanic greatness’.³¹

On the face of it, the case of Eichmann offers a strong case for Bauman’s ‘rational choice’ argument. It also highlights, however, a major difficulty with his formulation of the problem. Hannah Arendt mentions one moment in the trial when Eichmann suddenly declared that he had lived his whole life according to Kant’s moral precepts and especially according to a Kantian definition of duty. Arendt comments that this was outrageous, since Kant’s philosophy was bound up with the human faculty of judgement (i.e. with thinking for oneself) and so rules out blind obedience. However, when pressed further, Eichmann revealed that he had read Kant’s *Critique of Practical Reason* and he came up with a roughly correct version of the categorical imperative:

I meant by my remark about Kant that the principle of my will must always be such that it can become the principle of general laws.³²

²⁹ Arendt, (1965) p. 287.

³⁰ Alain Finkielkraut argued in relation to the Barbie Trial that the Holocaust was ‘from Eichmann to the engineers on the trains... a crime of employees’ and that it was ‘precisely to remove from crime the excuse of service and to restore the quality of killers to law-abiding citizens ... that the category of “crimes against humanity” was formulated’ - Finkielkraut, A. (1992). *Remembering in Vain the Klaus Barbie Trial and Crimes Against Humanity*. New York, Columbia University Press, pp. 3-4 .

³¹ Arendt and Jaspers, (1993) p.62.

³² Arendt (1994) p. 136

He added that, from the moment he was charged with carrying out the final solution, he knowingly ceased to live according to Kantian principles. Arendt comments that Eichmann did not merely cease to follow Kant's categorical imperative but rather that he distorted it in line with Hans Frank's formulation which we mentioned above: 'Act in such a way that the Führer, if he knew your action, would approve it.' This meant that duty was duty, a law was a law, there could be no exceptions. Not even for one's own friends. But when Eichmann said that he had given up on Kant, this also meant in effect that he put his own self-advancement before any ethical concerns and blind obedience to the Leader before his own practical reason and reflective judgement. In saying this, he must have recognised at some level his own descent into thoughtlessness, lack of reflection, unreason.

This episode reveals the *inversion* of 'reason' and 'passion' in Bauman's reformulation of Kant. In place of Kant's identification of 'practical reason' with larger moral concerns and 'passion' with self-interest, self-advancement and self-preservation, Bauman reverses this order of association. Reason is now identified with self-interest, self-advancement and self-preservation, and ethics is now identified with one's emotional response to the face of the suffering Other. In Kant's hierarchy of reason and passion, passion is subordinated to the demands of 'reason' but it is not denounced or damned. Bauman's hierarchy is more severe: it does denounce 'reason' (that which Kant calls 'passion') in favour of postmodern ethics (that which Kant calls 'reason'). The neo-Kantian turns out to be more Kantian than Kant. The effect of this inversion is not only to accept the disconnection of rational choice from ethics, but also to sever the relationship between thinking and understanding on the one hand, and moral judgement

and decision-making on the other.³³ There are many moments in the text when Bauman writes of the separation of reason and ethics *under Nazism*. This may well be true, though I would continue to insist that the Holocaust had more to do with the ‘eclipse of reason’ (whether conceived in terms of economic, political or military utility) than with the triumph of reason, and with the triumph of a horrible kind of racist morality rather than with the eclipse of morality. The main point, however, is not to turn *this* opposition of rational and moral choice into an unalterable fact of ‘modernity’, still less into a fact of life as such. This is the slippage which seems to dog Bauman’s extraordinary analysis.

The case of Eichmann reveals a man who, when he became a Nazi, self-consciously gave up on ‘practical reason’ (thinking for himself, developing his reflective capacities, judging on the basis of universal criteria) and replaced it with mere obedience to orders, social conformity, rigid duty to order. This was his choice. It was a terrible one in the circumstances. But it had nothing to do with the effacement of a pre-social moral consciousness by the technical-rational norms of modernity. For the individual’s capacity to think and judge for herself is as much a feature of ‘modernity’ as is the awesome power of ‘society’ over the individual.

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The interconnections of thinking, willing and judging and the dangers inherent in the separation of thinking from willing and judging became the subject matter of Hannah Arendt’s later investigations in *The Life of the Mind*. Hannah Arendt, (1978) *The Life of the Mind*, New York: Harcourt Brace Jovanovich.

vi) Conclusion on individual responsibility

Bauman is not explicit about his attitude to trials for crimes against humanity³⁴, though he does comment that he found the experience of the Demianiuk and Barbie court cases “embarrassing”³⁵. His work could be read as a theoretical underpinning of an argument that it is impossible for a court of law to remove from *crime* the excuse of *service* as Finkelkraut hopes. Indeed, Klaus Barbie's defence, and in fact also those of Eichmann and the Nuremberg defendants, were not incompatible with the substance of Bauman's work.

Barbie's lawyers, the Congolese M'Bemba, the Algerian Bouaïta, and the French-Vietnamese Vergès, constructed a ‘left wing’ and ‘anti-imperialist’ defence. Barbie's actions were not crimes against humanity; the Holocaust was simply a family quarrel amongst white Europeans; whites did to other whites what all Europeans routinely do to everyone else - so what? asks the rest of the world. By putting Barbie on trial you are simply trying to camouflage European history, to scapegoat the Nazis for that which you are all responsible.³⁶

If the structures of modernity are as deterministic as in Bauman's account, then trials make little sense, since nearly everyone is guilty. Only those who took a moral decision to step outside of the structures of modernity, are, in this framework, not guilty. Bauman stresses the fact that this was possible; he gives examples of individuals who risked their lives to behave morally and ‘irrationally’; but they are necessarily very rare and unusual individuals. Moreover, trials make little sense because courts are exactly the

³⁴ At a lecture Bauman gave at Warwick University on the 19th February 2001, I was, twice, able to ask him what his attitude was to crimes against humanity trials is. I still do not know what his attitude is, since he seemed to go to some lengths to avoid giving a straight answer.

³⁵ Bauman p.

sort of modernistic, rule-bound, bureaucratic, rational institutions which Bauman argues are responsible for the Holocaust. Tribunals themselves, for Bauman, surely must fail to step outside of the realm of totalitarianism.

So is the precedent set at Nuremberg, to hold individuals responsible for their actions sustainable? What can we say about the ways in which decisions to commit such crimes are actually made?

First, we are not dealing with individuals who had prior (fixed) preferences for antisemitism and were thus 'just on the look out' for propitious circumstances in which they could maximise these preferences at low opportunity costs to themselves. The making of a mass murderer is a social process in which there is an interplay between the act and the actor in which the commission of the deed may precede both its signification and its justification by the actors involved. Rather than the motive leading to the act, it was often the case that complicity in atrocity, torturing and murdering innocent human beings, led to the search for good reasons – perhaps on the basis of the Pascalian principle that if you kneel first, then prayer will follow. There must be an emphasis on the malleability of preferences, on how experience changes them, on how 'ordinary men' turn into hardened monsters or at least become hardened in their monstrous acts.

Second, the making of a mass murderer is a social process in which there is also an interplay between structure and agency. Regarding structure, the führer principle represented a new context (*contra* Bauman) in which 'ordinary people' are given new carrots to become 'extraordinary' by committing vile deeds. We see here a kind of ordinary (conformist and officially validated) extraordinariness. Once these incentives

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Finkelkraut, A. (1992). *Remembering in Vain the Klaus Barbie Trial and Crimes Against Humanity*. New York, Columbia University Press.

disappear, some became (like Eichmann) obedient servants to the authority of the court that tries them and most become ordinary ‘democratic’ civil servants and businessmen. Regarding agency, it is clear that some people walked away from the ‘incentives’ to murder and exercised their own moral judgement. Such judgements were not entirely ‘reflective’ in the sense that there were no rules or standards to guide them, for individual subjects could still appeal beyond the particular normative order of the so-called *Volk* to a humanist tradition – of thinking for yourself, of the right to subjective freedom, of universal equality – that is as much part of ‘modernity’ as instrumental rationality. I see here strong confirmation of the argument (*contra* Bauman) that not even this totalitarian epoch could reduce all action to instrumental rationality. On the contrary, totalitarian terror demonstrated ultimately the subordination of instrumental rationality to a certain ‘moral’ point of view in which (as Hannah Arendt has argued) questions of economic, political and military utility were self-consciously subsumed to the *end* of killing and degrading Jews.³⁷

Put at its strongest, it is difficult to escape the conclusion that the moral point of view is *always* a crucial element of decision making in the modern world and that no rational choice can be understood *solely* in terms of instrumental rationality. For without reference to moral concerns, we cannot explain how some people monitor their preferences, refuse all incentives to violate them and resist to the end lending themselves to the horrible processes we have described in the text. Value rationality works not just as an accidental or subordinate ingredient within preference formation and expression, but

³⁷ Arendt (1994), ‘Understanding and Politics’ *Essays in Understanding*, Harcourt Brace, New York.

as a constitutive aspect of how ‘we’ – i.e. individuals thrown into a world without absolute foundations – make sense of, understand and judge the preferences we make.

The reality is that not everyone was responsible for the Holocaust. Social structures were in place which put considerable pressure on many individuals to commit crimes against humanity. There was peer pressure; there was the pressure to pursue personal success and advancement; there was pressure to conform; there was pressure to submit to ‘authority’; there was pressure to follow racist and genocidal ideology; there were risks, sometimes small, sometimes large, but very rarely life-threatening, in resisting these pressures. There were also more personal motives, such as killing as part of an adventure, as an outlet for psychological frustration and anger and such as simple sadism and love of power. But whatever motives were to the fore in any particular case, it is clear that individuals made choices; sometimes choice was limited; sometimes other options were not attractive; sometimes they were difficult and dangerous. Perpetrators are never merely the puppets of the social structure within which they find themselves.

Chapter 3

CRIMES AGAINST HUMANITY: THE DEVELOPMENT OF A UNIVERSAL

Auschwitz has become the signature of an entire epoch – and it concerns all of us. Something happened there that no one could previously have thought even possible. It touched a deep layer of solidarity among all who have a human face.
- Jürgen Habermas¹

The Nuremberg process, with all its inadequacies and flaws, was nothing less than the beginning of cosmopolitan criminal law. The acceptance of the use of the new legal charge of crimes against humanity heralded the acceptance of the principle that the most serious human rights abuses are the business of all human beings and that the prosecution of such crimes is a supra-national matter. The development of cosmopolitan criminal law is a process which occurs within the sphere of existing global politics and diplomacy and within the sphere of existing power relationships. It is a dirty and uncertain development, always beset by the grossest hypocrisy. It is diluted and perverted by those states and heads of states who have reason to fear the consequences of universal jurisdiction. It is the opposite of utopian; it has a real existence and an organic development. It is not just the assertion of an abstract universal by critics but it is the concrete development of a universal in the real world.

In this chapter I look at the development of crimes against humanity at Nuremberg, the ways in which the charge was used, and the codification of the term 'genocide' in the Genocide Convention. I then go on to examine the emerging academic discipline of genocide studies and the ways in which it understands and defines these concepts. The definition and use of key concepts and ideas in genocide studies is

¹ **Habermas J.** (1991). 'Historical Consciousness and Post Traditional Identity'. in *The New Conservatism*. London, Polity p. 251-2

different from the ways in which the legal institutions have developed them. The social scientists have tended to begin their investigations by pointing out the problems and flaws in the legal understandings of the phenomena. They are able to build complex arguments and analyses based on these various criticisms. Their work, however, remains somewhat up in the air: their definitions of, for example, 'genocide' may be better than those offered by the Genocide Convention, but each has their own definition, each has their own analysis, each has their own methodology: their work does not attain an existence outside of criticism. The law, on the other hand, develops, unevenly and in problematic ways, but organically it finds methods of dealing with the problems that it encounters.

a) The International Military Tribunal at Nuremberg

In his report to the President of the United States, Justice Jackson, the chief prosecutor, said that the important achievements of the Nuremberg process had been to make explicit what was already implicit in international law with respect to war crimes, crimes against peace and crimes against humanity, and to incorporate these principles into a judicial precedent.² Perhaps he was downplaying the degree to which the process was innovative, since during the trials it had been important for the prosecution to undercut the *ex post facto* argument which held that defendants were being tried for offences which did not exist in international law at the time of their commission. While the prosecution argued that the offence of crimes against humanity was in fact simply a distillation of existing law, the formulation and use of that charge set an important precedent.

² **Jackson, R. H.** *International Conference on Military Trials* (1949) Department of State Publication 3080, Washington D.C. p. 437

The London conference of the four powers, the USA, the USSR, Britain and France, took place in summer 1945, and produced the charter of the tribunal. The trial of the major war criminals started on November 20th 1945 and finished on October 1st 1946 with three acquittals, seven prison sentences and twelve death sentences. There were eight members of the tribunal or judges, a senior and an alternate from each of the four powers.

There were notable absences from the dock: Adolf Hitler, Josef Goebbels, Heinrich Himmler and Martin Bormann were dead. Gustav Krupp was intended to represent German industrial might in the dock, but was elderly and found by the court to be mentally incompetent. But all of the leading Nazis who had been arrested were on trial.

It is interesting that Otto Kirchheimer fitted a discussion of the Nuremberg process into a book entitled *Political Justice*, about the use by states of political trials: “the most dubious segment of the administration of justice, that segment which uses the devices of justice to bolster or create new power positions”.³ Does discussion of Nuremberg belong in this way next to discussions of the Soviet show trials and the French military trials of their FLN prisoners in Algeria?

It was not a new problem which faced the allied powers when confronted with the prospect of victory over the Nazi regime in 1945. Whenever the overthrow of an old regime is achieved, the problem is posed of how to deal with the old leadership in such a way as to neutralise them as a threat, to hold them to account for their actions and to build the foundations of the new regime in such a way as to make its difference clear to all.

³ Kirchheimer, O. (1969). *Political Justice - The Use of Legal Procedure for Political Ends*. Princeton, New Jersey, Princeton University Press, p. vii.

When Charles I and Louis XVI were executed, there was little doubt as to the legal irregularity of the institutions which decided their fates. It could not have been different, since, under all existing law, regicide was the greatest crime. Kirchheimer calls this the ‘trial by fiat of the successor regime’ and the Nuremberg war crimes trial “the most important ‘successor’ trial in modern history”.⁴ Part of its importance was in putting up a barrier between the past and the present. “Experience shows that every successor regime feels intensely that in condemnation of the predecessors’ practices lies the key to humanity’s future.”⁵ In this case, the successor regime consisted of a syndicate of the four allied powers rather than a domestic one.

The prosecution at Nuremberg charged the defendants with four counts. Count one, conspiracy, charged all twenty two of the defendants with participation in a common plan to prepare and execute the substantive crimes enumerated in counts two, three and four.

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.⁶

Count one is not outlined in the Charter as the other three counts are: the language of conspiracy is included in Art. 6(a) in relation to crimes against peace, but not (b) or (c) in relation to war crimes or crimes against humanity. The charter was the result of hurried negotiations in London, and as Bradley Smith says “showed the effects of much patching and compromise.”⁷ “One is at a loss to understand why conspiracy to prepare

⁴ Kirchheimer (1969) p. 323.

⁵ Kirchheimer (1969) p. 325.

⁶ Smith, B. F. (1977). *Reaching Judgement at Nuremberg*. London, Andre Deutsch, p. 61 (Article 9 of the London charter).

⁷ Smith (1977) p. 58.

an aggressive war should be a crime *per se* while conspiracy to set up a death camp should not be”⁸ comments Pomorski. The ambiguity and confusion of the charter left considerable law making powers in the hands of the tribunal, and Jackson, the American chief prosecutor, prepared the conspiracy count to include all the other substantive crimes, arguing that the tribunal should accept this, even though it was not explicitly allowed by the charter itself. In the end the judgement of the Tribunal rejected Jackson’s expansion of the conspiracy charge:

The conspiracy/criminal organisations plan was conceived by a young lawyer from the American department of war, Colonel Murray C. Bernays and it was set out in a memorandum dated September 15 1944.⁹ Bernays opposed an administrative solution to the problem of ‘de-Nazification’ preferring a judicial one which was intended to grant due process. He proposed that firstly, a court should adjudicate the Nazi government, party and agencies like the SS and SA as conspiracies to commit murder and other crimes. The same court should then try individuals considered to be representative of those organisations, who would then be found guilty of the same offences on the grounds of their membership in these organisations alone. Once the conspiracy is established, “each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof.”¹⁰ Thus any member of these criminal organisations could then be arrested and found guilty simply by virtue of their membership.

⁸ Pomorski, S. (1990). 'Conspiracy and Criminal Organization'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, Netherlands, Martin Nijhoff, p. 222.

⁹ Pomorski (1990) p. 215.

¹⁰ Pomorski (1990) p. 215.

Jackson argued for the conspiracy / criminal organisation approach in order to “reach a great many of the equally guilty persons against whom evidence of specific violent acts may be lacking although there is ample proof that they participated in the common plan or enterprise or conspiracy”.¹¹ Bernays’ plan was adopted by the Americans, with a little refinement and watering down.

Pomorski argues that the approach was important in that it allowed the tribunal to find that Hitlerism, as a social phenomenon, was criminal;

If one perceives a deterrent and preventive function of criminal law in a broad sense, if one views it as a consciousness-building factor, the idea of organizational prosecution fulfilled its tasks very well.¹²

Donnedieu de Vabres, the French senior judge, set out his argument against conspiracy in two deliberative sessions (June 27 and August 14 1946) and with two memoranda.¹³ First, conspiracy was, he argued, an Anglo-American legal concept, which was unknown to both continental and international law. Second, that the prosecution had failed to prove the existence of a huge 25 year conspiracy, beginning in the early twenties; it had failed to establish that there was a common plan, to prove that a group of people had, at a specific time and place, agreed on definite criminal objectives and the criminal methods they intended to use to attain them. Instead, the prosecution had merely gathered up various expressions of Nazi principles, such as passages from the party program and quotations from *Mein Kampf*, contending that these were the core of a fixed criminal plan. He argued that there had been no master plan, but a development of policy. If we understand Nazism through the work of Hannah Arendt, then the idea of a huge organised and coherent conspiracy is difficult to sustain. It is also clear that Nazi

¹¹ Pomorski (1990) p. 219.

¹² Pomorski (1990) p. 224.

policy, for example in relation to the Jews, was not planned in advance, but it developed over time. Third, that conspiracy was not a crime against international law at the time the acts were committed, so that any charges would be *ex post facto*. Fourth, that the London Charter had only listed three prosecutable crimes:

At the end of Article VI, the mysterious short paragraph had been added that stated that all those who participated in “a common plan or conspiracy” to commit any crimes would be “responsible for all the acts performed by any persons in execution of the plan.”¹⁴

Donnedieu de Vabres argued that this paragraph was aimed at complicity and did “not provide for a specific general crime” of conspiracy.¹⁵ Fifth, he argued that conspiracy required some degree of equality amongst the conspirators which did not exist in this case due to the overpowering weight of the Führer compared to the other actors. He wanted to convict for substantive crimes and, where necessary, also to punish accomplices and accessories, but to drop the conspiracy charges.

Smith argues that some German observers welcomed Donnedieu de Vabres’ opposition to conspiracy charges since they implied collective German guilt, but that Donnedieu de Vabres himself took the opposite position. He thought that to find the Nazi leadership guilty of the conspiracy would be too easily to absolve those Germans not directly involved. He was also worried that the Jewish conspiracy myth could be replaced by blaming a small secret Nazi conspiracy for Germany’s problems.

Karl Doenitz’s case illustrates the complexities involved in the idea of conspiracy. He was commander of the German submarine programme from 1935 until 1943, when he became commander in chief of the navy. He was convicted at Nuremberg on counts two

¹³ Smith (1977) p. 121.

¹⁴ Smith (1977) p. 122.

¹⁵ Smith (1977) p. 123.

and three, crimes against peace and war crimes, and sentenced to ten years in prison. There was much discussion in his case about the attack on Norway, and whether this particular attack was aggressive or defensive, since there was evidence that the British were also planning to attack Norway; there was also much discussion about the waging of submarine warfare and whether Doenitz had been responsible for a policy of failing to rescue or actively killing survivors of naval attacks. Biddle, the American judge, admitted that “Germany waged a much cleaner [naval] war than we did”¹⁶. The case against Doenitz hung on things that were not centrally important, and that may have been carried out by either side in the war, like the attack on Norway, or the ruthlessness of submarine warfare. But was there not a case for charging Doenitz with being a part of the Nazi machine which planned to rule the world and commit crimes against humanity? There was a division of labour; some ran death camps; others took the territory which was to be cleansed of Jews; others patrolled the seas to keep them safe for Nazi shipping and dangerous for enemy shipping. Irrespective of particular crimes committed by the U-boat fleet, there is a good argument for finding that those who ran the U-boat fleet were doing so as part of a greater Nazi plan. Crimes against humanity or genocide are necessarily conspiracies. Though the court in general rejected the conspiracy / common plan prosecution, it may be argued that to find defendants guilty of the other substantive crimes contained the necessary element of conspiracy in a different form.

Count two was crimes against peace.

All the defendants with divers other persons during the period of years preceding 8 May 1945 participated in the planning, preparation, initiation and waging of wars of aggression which were also wars in violation of international treaties, agreements and assurances.¹⁷

¹⁶ Pomorski (1990) p. 261.

¹⁷ Smith (1977) p. 16.

In 1927 the Assembly of the League of Nations adopted the *Declaration on Aggressive War* which declared aggressive war to be an international crime:

All wars of aggression are, and shall always be, prohibited. Every pacific means must be employed to settle disputes of every description, which may arise between states¹⁸

In 1928 these propositions were incorporated into the *Paris Pact for the Renunciation of War as an Instrument of National Policy*, signed by 15 states and later adhered to by 48 others, converting it into a universal treaty. The *Kellogg-Briand Pact* (1933), the *Convention for the Definition of Aggression*, re-affirmed these principles. The Tribunal at Nuremberg held that the *Kellogg-Briand Pact* in particular constituted international law against the waging of aggressive war. In its opinion the renunciation of war

as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.¹⁹

The Tribunal also noted that Article 227 of the Treaty of Versailles provided for the establishment of a special international tribunal to try the former German Emperor “for a supreme offense against international morality and the sanctity of treaties”. Article 228 provided for the indictment of others accused of having committed acts in violation of the laws and customs of war. No post world war one trials were ever organised, however.²⁰

Count three, war crimes, was the least controversial count since it relied on the most precedent. It added together the sections of the *Hague Rules of Land Warfare* and the *Geneva Convention* that prohibited certain wartime actions, such as acts of

¹⁸ Lukashuk, I. I. (1990). 'Crimes Against Peace'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands, Martinus Nijhoff p. 127.

¹⁹ Murphy, J. F. (1990). 'Crimes Against Peace at the Nuremberg Trial'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands,

mistreatment of prisoners, murder, and devastation not justified by military necessity.²¹

These conventions and treaties become part of international law that binds all states irrespective of whether or not they ratified this or that convention.

Common war crimes evolve into crimes against humanity if they are committed pursuant to orders drawn up in advance, and therefore, assume a state organised character and also have as their objective the mass annihilation of people.²²

States have the responsibility to prosecute their own soldiers who commit war crimes.

Clearly, when the state itself is criminal, the prosecutions must come from outside of the state.

b) Crimes Against Humanity.

[N]amely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population²³, whether before or during the war, or persecutions on political, racial or religious grounds in exception of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.²⁴

The term crimes against humanity first appeared in the declaration of 28 May 1915 by the governments of France, Britain and Russia concerning the massacres of Armenians in Turkey. This declaration declared that all members of the Turkish

²⁰ Martinus Nijhoff p. 149.

²¹ **Murphy** (1990) p. 150

²¹ **Smith** (1977) p. 12. Conventions against war crimes: St. Petersburg Declaration (1868), Hague Conventions (1907), Geneva Protocol (1929), Geneva Regulations on the treatment of prisoners of war, wounded sailors and the civilian population on occupied territory (1929), Geneva Conventions of 1949 and supplementary protocols thereto (1977).

²² **Reshetov, A.** (1990). 'International Law and Crimes against the Laws and Customs of War'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands, Martinus Nijhoff p. 169.

²³ On 22 Feb 2001, three Bosnian Serbs were convicted at the ICTY for crimes against humanity. They had been involved in the perpetration and organisation of the mass rape of women during the war in Bosnia. The significance of this case is that the defendants were found guilty of crimes against humanity solely on the basis of the rape charges. This case added rape to the specific crimes which can constitute crimes against humanity. **Osborn, A.** (2001). Mass rape ruled a war crime. *The Guardian*. London 23/02/2001; **Judgement in the Kunarac, Kovac and Vukovic trial**, 22 February, 2001, <http://www.un.org/icty/foca/trialc2/judgement/index.htm>

Government would be held responsible together with its agents implicated in the massacres.²⁵ However it remained nothing more than a declaration.

To the extent that the crimes committed by the Nazi regime, particularly against the Jews, were unprecedented, the formulation of a law which was capable of addressing the particular unprecedented characteristics was required. Crimes against humanity are different from murder, not just quantitatively, but also qualitatively. The Nazis were not simply unwilling to share Germany with the Jews; they were unwilling to share the earth with them. State expulsions, murders and persecutions were not unprecedented; in the context of international law, expulsions had been considered as crimes against neighbouring states. Genocide is qualitatively different; it is a “criminal enterprise against the human condition”²⁶. As Arendt puts it, genocide is

an attack upon human diversity as such, that is, upon a characteristic of the ‘human status’ without which the very words ‘mankind’ or ‘humanity’ would be devoid of meaning.²⁷

Genocide is a crime against every human being on the earth because it is an attack on each person's status as a human being; it means that a person's recognition as a person is conditional; it means that they may be defined as insects or rats instead of human beings, and treated accordingly. To make an analogy with murder: a murder is not considered only to be the concern of the individual who is murdered or that person's family. In most

²⁴ Ginsburgs, G. and V. N. Kudriavtsev, Eds. (1990). *The Nuremberg Trial and International Law*. Dordrecht, The Netherlands, Martinus Nijhoff p. 177

²⁵ Clark, R. S. (1990). 'Crimes Against Humanity at Nuremberg'. in *The Nuremberg Trial and International Law*. G. Ginsburgs and V. N. Kudriavtsev (Ed). Dordrecht, The Netherlands, Martinus Nijhoff p. 177

²⁶ Edgar Faure, Introduction to *La persécution des Juifs en France et dans les autres pays de l'Ouest* (Paris: Center of Contemporary Jewish Documentation 1947) p. 24 quoted in Finkelkraut, A. (1992). *Remembering in Vain the Klaus Barbie Trial and Crimes Against Humanity*. New York, Columbia University Press p.

²⁷ Arendt, H. *Eichmann in Jerusalem - A Report on the Banality of Evil* (1994) London, Penguin p. 268-9.

contemporary legal systems, it is also considered to be the business of the state, and it is the state which has responsibility for prosecuting the murderer. Similarly, the Nazi genocide was not simply the concern of the Jews, but was a crime of direct relevance to the whole of humanity.

The formulation and prosecution of crimes against humanity by the four powers at Nuremberg was therefore a cosmopolitan act. That formulation was a recognition that such a crime is not the property of any particular group or state, nor does it fall within the jurisdiction of any; it is the responsibility of human beings in general. Implicit within the logic of the term is the need for an international court, though that is not to say that crimes against humanity cannot be prosecuted before one is constituted.

Also implicit within the term itself, is a particular, modern, universalistic conception of 'humanity'. It is a conception which assumes a fundamental equality of right throughout the human community. It assumes that human beings are necessarily bearers of basic rights.

Robert Fine²⁸ traces the ways in which the use of the crimes against humanity charge at Nuremberg was viewed by writers at the time of the trials. He identifies four distinct contemporary strands of opinion. Firstly, a cosmopolitan point of view, such as that of Karl Jaspers. Jaspers defined four strata of responsibility for the genocide²⁹: political responsibility, in which each human being had a responsibility for how they were ruled; moral responsibility, in which each person would confront the 'countless acts of indifference' without which genocide would not be possible; and metaphysical responsibility, in which every individual is held responsible for the fact that human

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Fine, R. (2000). "Crimes against humanity: Hannah Arendt and the Nuremberg Debates." *European Journal of Social Theory* 3(3): 293-311.

beings are capable of such crimes. Finally, legal responsibility was to be addressed by criminal courts and would be assigned to those who had actually carried out crimes against humanity, whether with their own hands, or behind a desk. Jaspers argued that the prosecution of crimes against humanity was centrally important in order to avoid the designation of collective national guilt onto Germany. The prosecution of mass murderers as mere criminals would remove their aura of satanic greatness and expose them in all their banality. The world would not allow such crimes to go unpunished.

Secondly, Fine identifies a realist critique, represented most strongly by the defendants themselves, which defined the Nuremberg process as nothing more than the application by the powerful, of their own will. This application of power was obfuscated behind a façade of due process. The charge is that the process was nothing more than victors' justice. Kirchheimer addresses this criticism in a way which acknowledges its strength: "in all political trials conducted by the judges of the successor regime, the judges are in a certain sense the victor's judges".³⁰ He focuses on the different attitudes which were taken to the trial by the USSR delegation and that of the Americans at the London conference. The Russians wanted to set up the tribunal in such a way as to guarantee that all the defendants would be 'convicted' and executed. Jackson preferred the traditional Western approach, that there should be a separation of power between the tribunal and the prosecution; that the judges should be independent and should be in a position to evaluate the evidence presented, and to come to a verdict based upon it. Kirchheimer argues that in reality there was less of a difference between the cynical realism of the USSR and the American approach than there appeared to be. "Occurring

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Jaspers, K. (2000) *The Question of German Guilt* Fordham, Fordham University Press.

³⁰

Kirchheimer (1969) p. 332.

in the wake of a National Socialist defeat, the trial could not but take the defeat of National Socialist doctrine and practice as its starting point.”³¹ So there was not a contradiction between the existence of an independent judicial tribunal on the one hand and the manifestation of power on the other; rather, the manifestation of the power of the victors was expressed in the form of an independent judicial tribunal. The trial was not presided over by God, judging the Nazis from above and outside of the world. It was organised by those forces which had defeated Nazism militarily and ideologically. It was organised by the victors over Nazism in the name of a set of values which it held to be superior to those of Nazism, namely, human rights.

This leads directly towards the second of the realist critiques put forward by the defendants at Nuremberg: the *tu quoque* argument. They attempted to normalise what they did, arguing that there was nothing special about the inhumanities committed by the Nazis in relation to a whole history of man’s inhumanity to man and in particular in relations to crimes carried out by the four powers. How could the two old imperialist powers, the regime which had perpetrated the vast Stalinist purges, and the one which had just exploded two atomic bombs in densely populated cities sit in judgement over the Nazis under the banner of human rights?

In a wider sense, the *tu quoque* argument could be leveled against any type of terrestrial justice. Only the archangel descending on judgement day would be exempt from the reproach that blame and praise have not been distributed according to everyone’s due desert.³²

Kirchheimer argues that this is an argument addressed to the public at large, and to future historians, rather than a serious defence in a court which, of course, in general, refused to hear it.

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Kirchheimer (1969) p. 334.

The *tu quoque* argument was a stronger argument against the Nuremberg process, whose charter disqualified in advance the examination of crimes committed by anyone other than the Nazis than it is against more recent tribunals such as the ICTY. While the ICTY's establishment by the security council still protects the great powers who may use their vetos, it has no such limitations in the body of law with which it operates. Serbs, Croatians and Bosnians may all be charged with crimes. Perhaps the *tu quoque* argument becomes less damning as cosmopolitan law advances; the success and the progress of cosmopolitan law may be judged by the progress it makes in being able to defeat the *tu quoque* argument, rather than, as it did at Nuremberg, simply to ignore it.

The realist critique also challenged the legality of the process; there were new 'laws' but no legislature and the laws under which they were tried did not exist at the time of the crimes. They argued that they should not be made to take responsibility as individuals for offences which were carried out by the state and were legally authorised by it. Kirchheimer argues in response to this defence that such acts as making policies to select and kill individuals on the basis of their 'racial' characteristics do

not give such enactments the dignity of law. It is the negation of the purpose of law, which even in the form of the shoddiest enactment must still offer a password: the ordering of human relations.... The presumed validity of an enactment does not necessarily exculpate those who might consider invocation of the statute a foolproof defense mechanism. An enactment in itself is a mere cipher, whose real import and weight... are determined by those who fashioned it or learned to mold it in constant practice.³³

³² Kirchheimer (1969) p. 337.

³³ Kirchheimer (1969) p. 328. Neumann also argues persuasively that there was nothing which could be rightfully characterised as law in Nazi Germany (Neumann, F. (1963). *Behemoth - The Structure and Practice of National Socialism 1933 - 1944*. New York, Octagon Books Inc.) Fuller, also argues that since Nazi enactments were retroactive and secret they could not be understood as laws, Fuller, L. L. (1969). *The Morality of Law*. New Haven, Yale University Press.

The third approach which Fine examines is Heidegger's argument 'against humanism'. Humanity itself was not innocent; many of the greatest atrocities had been carried out in the name of humanity against those designated to be inhuman or bearers of inhuman culture. Crimes against humanity were committed by Germans; crimes for humanity were committed by their accusers. Michel Foucault has persuasively charted the inhumanities committed in the name of humanism. For example, the development of the modern prison system was intended to replace ancient and inhuman corporeal punishments with modern, reasonable and efficient methods designed to rehabilitate the souls of criminals; Foucault exposed the horrors and the anti-human nature of the modern humanistic approaches.³⁴ Similarly, the terrors of the French Revolution, and of Stalin's Communism, were committed in the name of humanity, against those sections of society which were held not to recognise the existence of any fundamental human community. Heidegger was against individuals being held criminally responsible at Nuremberg, arguing that the legal subject was a fiction which forgets the historicity and finite freedom of human existence and the homelessness of modern human beings. He argued, and Bauman was later much influenced by his argument, that the events of the Holocaust were the results of such a profound malady of modern society that any attempt to scapegoat a few individuals in a legal process would constitute nothing more than empty hypocrisy.

Fine argues in summary that the originality and strength of Arendt's understanding of the Nuremberg process was in the way she recognised the justification of these three understandings of the Nuremberg process; humanist, realist and post-humanist. She wove them together into a fourth way of looking at the process which

³⁴ Foucault, M. (1991). *Discipline and Punish*. Harmondsworth, Penguin.

uneasily holds together all of their insights. We do not find in Arendt's work a synthesis so much as restless movement from one way of seeing to another, but what gives her discussions their force is their openness to equivocation and readiness to take the risk of making clouds rather than clearing them.³⁵

At the time of Nuremberg Arendt wrote to Jaspers that the Nazi crimes were such that no law could prosecute them, that no mundane criminal process could achieve any sort of justice or could punish the perpetrators with anything but an inadequate sentence. "...[T]his guilt in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis at Nuremberg are so smug."³⁶ Yet fifteen years later, at the Eichmann trial, it was Arendt who defended the trial against Jaspers' scepticism. For her, the trial represented missed opportunities to push the bounds of cosmopolitan law, to institute an international court and to bolster the offence of crimes against humanity. Nevertheless she defended the right of the Israelis to kidnap the indicted Nuremberg war criminal Eichmann from a state with a bad record for extradition, and to put him on trial. It served the cause of justice, it resulted in the punishment of Eichmann, it served to allow many victims their day in court and it re-told the story of the Holocaust, in an authoritative way, to a new generation. Throughout her work, Arendt holds onto both the cosmopolitan project of international law and the many problems and shortcomings of its reality at the same time. She wrestles with the perplexities and contradictions. She avoids what Fine³⁷ refers to as cosmopolitan

³⁵ Fine, R. (2000). "Crimes against humanity: Hannah Arendt and the Nuremberg Debates." *European Journal of Social Theory* 3(3): 293-311.

³⁶ Arendt, H. and K. Jaspers (1992). *Correspondence 1926-1969*. New York, Harcourt Brace p. 54.

³⁷ Fine, R. (2000). "Crimes against humanity: Hannah Arendt and the Nuremberg Debates." *European Journal of Social Theory* 3(3): 293-311.

utopianism as well as 'realist' cynicism while engaging positively with the question of crimes against humanity prosecutions.³⁸

During the preparations for the main trial at Nuremberg, the Russians had specifically wanted the inclusion of a charge relating to the massacre of Polish officers in the Katyn forest. However the Americans found evidence that showed that it was the Russians themselves who had committed the massacre. The scandal was hushed up by the court.³⁹ This incident, however, illustrates the fact that the cold war was, during the trials, rapidly beginning to freeze. There had been a period of about a year, when the interests of all the great powers converged around the prosecution of the Nazis and the development of cosmopolitan law. This remarkable period, however was short-lived. The struggle between the USSR and the USA for global hegemony began to take precedence over the establishment of a global legal order and co-operation in the name of justice quickly crumbled.

The cold war saw the emphatic re-emergence of particular interest as against cosmopolitan order. The global bi-polar struggle was everything. Thinking about international relations in this period was *realist* and cynical. Both sides held that victory

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In a process which ran parallel to the Nuremberg tribunals, Between 1945 and 1951, Allied military commissions condemned 920 Japanese to death and sentenced 3000 others to prison terms who had been found guilty of crimes during the second world war. The International Military Tribunal sat in Tokyo from 1946 to 1948, trying the 25 most senior Japanese defendants. The International Military Tribunal for the Far East (IMTFE) was set up by a 'special proclamation' of General MacArthur, Supreme Commander for the Allied Powers in the Pacific, with a charter similar to that for the Nuremberg tribunal. One important difference was that only persons charged with crimes against peace could stand before the tribunal; all others were to be tried by national or other courts. The Emperor of Japan, Hirohito was not charged with any crimes. This seems to have been simply a political decision made by the Americans; they wanted Hirohito to remain as the emperor in their newly established regime. Political considerations, and the consolidation of a friendly and anti-Russian regime took precedence over cosmopolitan law. (Piccigallo, P. R. (1979). *The Japanese on Trial*. Austin, University of Texas Press.)

39

Smith (1977) p. 104

in the global ideological and military struggle was the pre-requisite for any kind of justice.

During the American war in Vietnam, there was little question of any kind of supra-national jurisdiction over crimes committed by combatants, but there was one notable exception. A military court-martial tribunal found William L. Calley guilty in April 1971 of the murder of “at least 22” Vietnamese civilians at My Lai on 16 March 1968. Between 8.00 a.m. and noon on that day, 504 non-combatant inhabitants of My Lai, everyone who was there, was killed by the American soldiers of “Charlie Company”.⁴⁰

Calley was, even before My Lai, a sadistic killer. During a previous assault on a village, he had thrown a defenceless old man down a well and shot him.⁴¹ At My Lai, he saw a baby crawling away from a ditch which was already filled with dead and dying villagers; he seized the child by the leg, threw it back into the pit, and shot it.⁴² Nobody else was ever held legally responsible for the massacre; no other killers, no-one higher up the chain of command. No one else was found guilty of any war crime during the entire Vietnam war. Calley was sentenced to life imprisonment with hard labour. He served his sentence under extraordinarily comfortable conditions and was released on parole in 1974 by Judge Robert Elliott, who said, “war is war and its not unusual for innocent civilians such as the My Lai victims to be killed”⁴³.

While there was a lack of official tribunals and legal accountability, it is nevertheless true that during the Vietnam war, one important weapon in the armoury of

⁴⁰ Anderson, D. L. (1998). *Facing My Lai - Moving Beyond the Massacre*. Kansas, University Press of Kansas.

⁴¹ Bilton, M. and K. Sim (1992). *Four Hours in My Lai*. London, Penguin. p. 1

⁴² Bilton (1992) p. 1

the anti-war movement was the appeal to international law. The war could legitimately be characterised as a crime against peace; there was much behaviour which could be characterised as war crimes and crimes against humanity. Bertrand Russell wrote a book, for example entitled 'War Crimes in Vietnam'⁴⁴, and Jean-Paul Sartre⁴⁵ published a pamphlet with the same name, arguing that American war in Vietnam constituted genocide. In May 1967 in Stockholm and November 1967 in Roskilde, Denmark, a tribunal was organised to investigate whether the USA was guilty of crimes under international law in Vietnam. While this tribunal had no official legitimacy, it was supported by many well known individuals in the anti-war movement. Even at a time when the official international structures of cosmopolitan criminal law were non-existent, ideas of law and justice still constituted an element in the campaign against the Vietnam war. International criminal law had an existence even outside of official structures. The characterisation of acts in terms of their illegality or criminality can be a powerful moral and political weapon.

c) The Genocide Convention and The Problems of Defining Genocide

The Genocide Convention (1948) was agreed in order to add further clarity to cosmopolitan law by defining genocide as a specific crime. Article II defines the following as genocide:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- b. Killing members of the group;
- c. Causing serious bodily or mental harm to members of the group;
- d. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

⁴³ Bilton (1992) p. 2

⁴⁴ Russell, B. (1967). *War Crimes in Vietnam*. London, Allen & Unwin.

⁴⁵ Sartre, J.-P. (1970). *War Crimes in Vietnam*. Nottingham.

- e. Imposing measures intended to prevent births within the group;
- f. Forcibly transferring children of the group to another group.⁴⁶

There is much dispute about the interpretation and the validity of this definition.

Some writers, for example, Elie Wiesel or Steven Katz⁴⁷ have emphasised the uniqueness of the Nazi genocide of the Jews. They have a narrow and specific definition of genocide, or a narrow and specific interpretation of the definition, which includes only the Holocaust and excludes all other cases of mass killings. Alain Destexhe⁴⁸ puts forward a narrow definition of genocide such that there have only ever been three: the genocide of the Armenians in Turkey in 1915, of the Jews and Gypsies in 1942-45 and that of the Tutsis by the Hutus in 1994. At the other end of the spectrum, there are a number of social scientists, who have established an academic discipline which they call genocide studies, who define genocide in a much broader and more inclusive way.⁴⁹

Steven Katz says that in this debate, writers must be careful not to claim “for [their] own collective national catastrophe some pride of place”⁵⁰, though it appears that in this respect he is not, himself, excessively careful. He surveys a number of instances of mass killing, and shows why each one can not be considered to be a real genocide, except for the Holocaust. In the case of the destruction of the native people of North and South America, he argues that even though many millions were killed, and the death rate

⁴⁶ Compare with the definition of crimes against humanity from Nuremberg: “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, whether before or during the war, or persecutions on political, racial or religious grounds in exception of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

⁴⁷ **Katz, S.** (1983). *Post-Holocaust Dialogues*. New York, New York University Press.

⁴⁸ **Destexhe, A.** (1995). *Rwanda and Genocide in the Twentieth Century*. London, Pluto.

⁴⁹ For example:

Charny, I. W. (1994). 'Toward a Generic Definition of Genocide'. in *Genocide*. Andreopoulos (Ed). Philadelphia, University of Pennsylvania Press.

Kuper, L. (1982). *Genocide - Its Political Use in the Twentieth century*. New Haven, Yale University Press.

Fein, H. (1993). *Genocide: A Sociological Perspective*. London, Sage.

was about 40% of the population, which is similar to the Jewish death rate in Europe, there was no genocidal ideology or intent. In the case of the killing of the Armenians in Turkey in 1915, there was similarly no genocidal intent, but rather the killing was the result of an over-zealous nationalism. The purpose was ethnic cleansing, rather than killing. He makes a similar argument in the cases of the killing of the Ibo in Nigeria and of the native Brazilians. The Gypsies were killed by the Nazis but this did not constitute genocide:

The overall Nazi policy toward the Gypsies was different in kind from that toward the Jews. ... The Nazis did not ontologise the Gypsy into their metahistoric antithesis, nor did they make the elimination of all Gypsies from history a primal part of either their historic “moral” mission or their metaphysical “mythos”.⁵¹

Katz concludes: “I believe enough evidence has been marshaled to suggest that in and through the category of ‘intention’ we can begin to perceive at least one seminal individuating characteristic of the Holocaust.”⁵²

Alain Destexhe also stresses that intent is an important defining characteristic. Raphaël Lemkin, argues Destexhe, invented the word *genocide* in 1944, referring to the destruction of a nation or of an ethnic group implying the existence of a co-ordinated plan, aimed at total extermination, to be put into effect against individuals chosen as victims *purely, simply and exclusively because they are members of the target group*. That means that they are not targeted simply because they are held to be in the way, like the Muslims in Bosnia or Kosovo, nor because they pose a threat, real or imagined, like the political opponents of Stalin or Mao; nor because they live in a state which is waging a war, like the inhabitants of Hiroshima. The point about the use of the word *genocide*

⁵⁰ Katz (1983) p. 296.

⁵¹ Katz (1983) p. 308

⁵² Katz (1983) p. 310

for Destexhe, is that it describes a crime *motivated* purely by ‘racial, national or religious considerations’ and has nothing to do with the conduct of the war. Genocide contains no seed of utility; people are killed simply because they exist. It is “a crime against the person as a person, against the very humanity of the individual victim”.⁵³

Leo Kuper argues for a much wider definition because he is unhappy with the use of motive as a defining criterion. The genocide convention defines an act as genocide only when it is the killing of the ethnic group *as such*. This introduced motive as central. At the time when the convention was negotiated, the Russians insisted on the removal of the *political* motivation as being inconsistent with a ‘scientific’ definition of *genocide*.⁵⁴ The British insisted that *intent* was crucial, but *motivation* immaterial. The Venezuelans proposed the inclusion of the words *as such*. This means that to count as genocide in the terms of the Convention, motivation must be proven to be for purely non-utilitarian ethnic hatred. Kuper is critical of this inclusion of motivation on the grounds that it allows a defence to the charge of genocide. He gives two examples. The UN representative of Brazil, in reply to a charge of genocide against Indians in the Amazon argued that this could not be characterised as genocide since those carrying out the killing did so only for economic gain.⁵⁵ General Taylor argued that the bombings of Hiroshima and Nagasaki did not constitute genocide because people were killed because they lived in enemy strongholds and not because the Americans had the intention of killing them simply because of their ethnicity.

Destexhe wants to keep the definition of genocide narrow in order to focus attention on the most serious cases. He is worried about the dilution of the term

⁵³ Destexhe (1995) p. 4

⁵⁴ Destexhe (1995) p. 4

‘genocide’ and that a process of verbal inflation is diminishing its power. When people campaign against a particular set of acts which they consider evil, they often use the word genocide in order to highlight the seriousness of their case. The treatment of black people in America;⁵⁶ the selling of tobacco which causes millions to die of lung cancer; the abortion of millions of foetuses; the refusal by governments to fund AIDS research sufficiently; all have been characterised as genocides.

The genocide studies scholars want to keep the definition broad in order to incorporate into their discipline all cases of mass killing.

[b]y ‘genocide studies’ we mean attempts to expose, comprehend, and prevent the phenomenon of genocidal killing as a subject in its own right and, ideally, in comparative perspective.⁵⁷

Helen Fein carried out a study of introductory sociology texts from 1947-1977, and showed that a minority of texts in all decades defined and recognized genocide, that those in the middle decade (1957-1967) were least likely to mention genocide, while those published last (1968-1977) were almost twice as likely to recognise genocide as those in the decade after the World War II.⁵⁸ She goes on to say that “the beginning of professional social-scientific interest in genocide was in the 1970’s”, and that comparative research on genocide is almost wholly generated by scholars educated in the USA and writing in English.

These scholars reject the idea that the Holocaust was a profoundly unique or holy event which defies analysis and understanding. They situate themselves in a certain sociological and scientific methodological tradition, which particularly values comparative studies.

⁵⁵ Kuper (1982) p. 33

⁵⁶ Weisbord, R. G. (1975). *Genocide? Birth Control and the Black American*. Westport, Connecticut & London, Greenwood Press.

⁵⁷ Markusen, E. and D. Kopf (1995). *The Holocaust and Strategic Bombing - Genocide and Total War in the Twentieth Century*. Boulder, Colorado, Westview Press. p. 5.

⁵⁸ Fein, H. (1993). *Genocide: A Sociological Perspective*. London, Sage. P. 5.

Michael Freeman⁵⁹ formulates the rejection of the profound uniqueness argument by making a critique of Elie Wiesel's religious understanding of the Shoah and of his insistence of the primacy of survivor testimony over social scientific analysis. He quotes Wiesel's three reasons for holding that the Holocaust cannot be wholly explicable:

(1) the events obeyed no law and no law can be derived from them: (2) complete understanding would require identification with all the victims and all the executioners, which is impossible; (3) no language is sufficient to communicate the Holocaust experience; the language of science, in particular, fails before the suffering of the victims.

His answers to Wiesel are, firstly, that contemporary social scientific forms of understanding are more sophisticated and flexible than simply the search for 'laws' of social behaviour; that understanding can be derived from analysis, and that understanding does not need to aspire to a totalising quest for absolute knowledge. Secondly, that while empathy is necessary for an analysis of genocide, it is also necessary to go beyond the subjective consciousness of victims and perpetrators, and to investigate the social structures in which they find themselves, and which help to make them who they are, as well as simply focusing on their agency. And thirdly, that the problem of language is a general problem about the representation of experience, which may be particularly acute in the case of the Holocaust, but it would be a greater error for social science to ignore this challenge, than for it to attempt, sensitively and carefully, to confront it. Freeman also argues that, since Wiesel considers the study of the Holocaust to be important in order to prevent possible future genocides, then it is clear that past and future must have important elements in common. The Holocaust may be unique in certain ways, as is any

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Freeman, M. (1991). "The Theory and Prevention of Genocide." *Holocaust and Genocide Studies* 6(2): pp 185-189 p. 187.

event, but it also has features in common with other genocides, and other possible future genocides.

Markusen and Kopf similarly criticise those who they call, following Alan Rosenberg and Evelyn Silverman,⁶⁰ Holocaust ‘absolutists’, who hold that the Holocaust was a profoundly unique event, outside history and outside of the possibility of representation or comparison. They prefer to call themselves ‘contextualists’, which means that they see the Holocaust in its historical context, and that they assert the validity of comparison.

It is the rejection of the idea of the uniqueness of the Holocaust, and the insistence that it is an event within, not outside of history, which allows *genocide studies* to broaden its focus from the single event and to look also at similar social phenomena. And Leo Kuper, one of the founders of the discipline, says that he has been driven to this terrain by the realization that genocide is all too common in our own day, and that the organization charged with its prevention and punishment, the United Nations, responds with indifference, if not with condonation.⁶¹ A central concern, then, of the emerging discipline is not the uniqueness, but the ordinariness of genocide. And, as Bauman argues, sociology’s traditional neglect of the field as a pathological condition of society, rather than as an aspect of society’s normal functioning becomes untenable.

Israel W. Charny argues as follows:

What is needed, I would argue is a generic definition of genocide that does not exclude or commit to indifference any case of mass murder of any human beings, of whatever racial, national, ethnic, biological, cultural, religious, and political definitions, or of totally mixed groupings of any and all of the above.

⁶⁰ Rosenberg, A. and E. Silverman (1992). ‘The Issue of the Holocaust as a Unique Event’. in *Genocide in Our Time*. M. Dubkowski and I. Wallimann (Ed). Ann Arbor, MI., Pierian Press.

⁶¹ Kuper (1982) p. 9.

I propose that whenever large numbers of unarmed human beings are put to death at the hands of their fellow human beings, we are talking about genocide.⁶²

Chalk argues that social scientists have a different set of objectives to those of international lawyers. Lawyers are concerned with successful prosecution, while sociologists are concerned with

outlining the boundaries of a set of cases which they want to study for the purpose of discovering their common elements and analyzing the processes that brought them about. Perhaps these differences in objectives account for the differences in breadth and focus which one finds in the several definitions of genocide that have appeared since the concept was first elaborated by Raphaël Lemkin in 1944.⁶³

Assigning a high value to comparative studies is characteristic of *genocide studies*. Their methodology is fundamentally an empiricist one, which flows from an empiricist tradition in American social science. It is concerned to distance itself methodologically from mystical or impressionistic approaches to the subject; from those approaches which assert the dominance of experience over analysis; from those which argue that the only possible response to genocide is silence; from those which cannot go beyond horror and moral indignation; and from those which seek to make genocides into the property of one or other group, to use them for political ends, and which seek to establish the place of one group or other at the top of the hierarchy of the oppressed. Focus on comparative study is an attempt to replace these approaches with dispassionate scientific investigation. It wishes to appear respectably scientific and scholarly.

The work by Markusen and Kopf,⁶⁴ who undertake a comparative study of the Holocaust and allied strategic bombing in the second world war, is typical of genocide

⁶² Charny, I. W. (1994). 'Toward a Generic Definition of Genocide'. in *Genocide*. Andreopoulos (Ed). Philadelphia, University of Pennsylvania Press p. 74.

⁶³ Chalk, F. (1994). 'Redefining Genocide'. in *Genocide*. Andreopoulos (Ed). Philadelphia, University of Pennsylvania Press p. 46.

⁶⁴ Markusen (1995).

studies. They compare two common types of contemporary governmental mass killing, and they find that they have many common features, enough, indeed to allow them to call strategic bombing genocidal. This enables them to highlight the unacceptability of strategic bombing, which is a form of mass killing that is often regarded as a necessary evil and so defensible, by arguing that it is little different from genocide, which is universally condemned.

The comparison between the Holocaust and strategic bombing consists of discovering a number of traits which Markusen and Kopf argue are common to the two. They argue that important common characteristics are as follows:

- i. The dehumanisation of the *other* - by the mass media, governments, the elite, the educational institutions, the killers.
- ii. The role of the *healing-killing paradox*. This means that people sometimes kill in the belief that they are protecting themselves, or their group.
- iii. Scientific rationalisation; bureaucratic distancing.
- iv. Technical distancing
- v. Organisational loyalty. Air Force decision makers are loyal to the Air Force, Nazi killers are loyal to their particular police outfits.

In investigating whether strategic bombing is genocidal, they use Helen Fein's criteria:⁶⁵

- i. There is a sustained attack, or continuity of attacks, by the perpetrator to physically destroy group members.
- ii. The perpetrator is a collective or organized actor or a commander of organized actors.
- iii. Victims are selected because they are members of a collectivity.
- iv. The victims are defenseless or are killed regardless of whether they surrendered or resisted.
- v. The destruction of group members is undertaken with intent to kill and murder is sanctioned by the perpetrators.

They find that, since all these criteria are present, that strategic bombing is, indeed, genocidal. They do, however quote Helen Fein, arguing that “[t]o equate Hiroshima and Auschwitz belies the distinctive end and design of each plan and their

distinctive effects.”⁶⁶ She argues, further that they fail to consider whether the scientists and planners involved in nuclear strategizing are actually ‘value free,’ unthinking about the ends of their acts, or whether they do take responsibility for involvement in the nuclear project – as some do- in order to prevent war. Thus, labeling their acts genocidal disregards the evidence that it is not their indifference to killing but their estimation of the risks of avoiding killing that is the issue separating anti-nuclear activists and nuclear engineers.

Both Markusen and Kopf’s thesis, and Fein’s critique, can be seen as illuminating examples of the methodology of *genocide studies*. The discovery, and subsequent use, of check-lists of traits, which are common to genocides can be seen to be problematic. The lists of traits or characteristics which are produced by genocide studies are in fact far from straightforward and require deeper analysis. Also, they rely very heavily on definitions, which are inevitably, at some level, arbitrary. This is, perhaps, why so much of the work produced by these theorists is concerned with analysis of and argument for certain ways of defining key terms, such as genocide itself, which, even within the discipline, is much disputed. There is also much creation of new terms, such as Leo Kuper’s *genocidal massacre*,⁶⁷ Rummel’s *democide*,⁶⁸ *sociocide*, *linguicide*, and *cultural genocide*.⁶⁹ Fein herself is critical of these last three inventions, arguing that “genocide becomes not only unbounded but banal, an every day occurrence”.⁷⁰ But the reason why definition comes to be such a centre of controversy is not only that the term *genocide* contains great moral weight, and therefore great temptation to highlight this or that form

⁶⁵ Markusen (1995); Fein (1993).

⁶⁶ Markusen (1995).

⁶⁷ Kuper (1982).

⁶⁸ Fein (1993) p. 75.

of repression. It is also because the empiricist method of genocide studies relies on the definition and discovery of key characteristics, and seems unwilling to delve deeper inside the social phenomena themselves, which may risk the charge of unscholarly or unscientific investigation. The strictly scientific methodology always seems to be traceable back to an arbitrary definition.

Referring back to Markusen and Kopf's list of common characteristics between strategic bombing and the Holocaust, it is clear that the question of dehumanization, for example, is complex, and requires deeper investigation. Dehumanisation is often posited as one of the key features of genocide.⁷¹ And certainly, human beings are often portrayed by genocidal formations as cockroaches, rats, or germs, which need to be killed for the health of the greater society. Yet, on the other hand, genocide, and specifically sadistic treatment and killing of victims, are not committed against non-humans, but, emphatically against human beings; human beings who are seen as threatening, potentially powerful, worthy of hatred and deserving of the most terrible punishment. Dehumanization cannot be simply reduced to an unproblematic trait, which can then be used as a measuring stick in some statistical analysis. Also, while it may have had certain aspects in common, the quality of Nazi racism against Jews was surely different from that of the allied war machines against German and Japanese people – to simply package both of these distinct forms of anti-human ideology as “dehumanization” is surely to over-simplify and gloss over exactly the complexities which ought to be under investigation.

⁶⁹ **Fein** (1993) p. 17.

⁷⁰ **Fein** (1993) p. 17.

⁷¹ For example, **Freeman** (1991) p. 190.

The *healing-killing paradox* is another example of a term which is invented in order to show a common strand which runs throughout different genocides. It is grandly named, but the point is surely banal: often when people kill, they think, or they say, that they are killing in order to heal. It is just another way of saying that when people kill, they believe they have good justification to do so, that it is some form of self-defence.

Scientific rationalization, bureaucratic distancing and technological distancing are also held to be traits characteristic of genocide. The genocide studies scholars appropriate these simple traits from Bauman's work, as if that work just added extra empirical knowledge to their own. The fact that Bauman's work is a thorough-going and vigorous critique of their whole methodology seems to be entirely unimportant. In any case, often genocide is carried out with very little bureaucratic or technical distancing; the *Einsatzgruppen*, for example or the Rwandese machete *genocidaires*, acted without the need for any of Bauman's moral sleeping pills.

Fein's distinction between nuclear-weapon designers and *genocidaires* is that the former believe they are acting to minimise killing, whereas the latter are indifferent to killing. Behind the façade of hard scientific methodology lurks the arbitrariness of hidden value judgement. Does not the *healing-killing paradox* tell us that all *genocidaires* also believe that they are acting to minimise harm?

All of these debates about the uniqueness of the Holocaust and the definition of genocide, as Norman Geras⁷² has argued, leave one feeling uncomfortable. The heat of the debate feels disrespectful to the victims. There is a suspicion that there are hidden agendas and that the participants in the debate are engaged in competition to define some

⁷² Geras, N. (5/2/1998) 'Singular Question, Singular Crime' conference paper, *Social theory after the Holocaust*, Warwick University.

mass killings as more profound or important than others. Norman Finkelstein⁷³ argues that some of the insistence on the uniqueness of the Holocaust is explicable for political reasons connected with gathering support for the Israeli state. Yet on the other hand, some of the arguments against the uniqueness of the Holocaust downplay the enormity of this particular, world-changing event.

The arguments about intent are all, in the end, a little arbitrary. There is no 'pure' genocide, unsullied by the pursuit of money, land, political advantage; and there is also no purely utilitarian mass killing, untainted by a racist ideology which defines the worth of the lives of some as being less than others.

The tribunals for the former Yugoslavia and for Rwanda have both made convictions for genocide. They seem less concerned about the niceties of definition, and seem to be happy to convict, for example, Dusko Tadic, without profound investigations as to the intent of the Bosnian Serbs, as to the particular ratio of self-interest to exterminatory racism which motivated the killing and ethnic cleansing. The tribunals seem to be able to operate effectively enough with the existing definitions of genocide and crimes against humanity, even if they are theoretically unsatisfactory in some respects.

These genocide studies scholars are disabled by their self-imposed methodological restrictions. They fail to rid their analysis of value judgements but only succeed in hiding them behind a façade of respectable objectivity.

They are trying to understand and analyse the social reality of genocide but they do not pay enough attention to the ways in which, as it were, the social reality understands itself. The existing social phenomena of genocide are being made sense of

⁷³ Finkelstein, N. (2000). *The Holocaust Industry*. London, Verso.

and given meaning by the existing social phenomena of the institutions, body of law, and ideas of cosmopolitan criminal legal processes. The abstract understanding which the genocide studies scholars impose onto the world is too far removed from the structures which the world develops by itself, to adequately address the phenomena in question. The existence of the crimes against humanity charge at Nuremberg and its general acceptance as law is more radical than any moment of utopian criticism.

CHAPTER 4

PEACE, SECURITY AND JUSTICE IN THE FORMER YUGOSLAVIA

In chapters four and five I look at three different approaches taken by the international community towards the conflict in the former Yugoslavia. In Srebrenica security and justice were subordinated to a vain quest for peace and for the avoidance of conflict. The wish to avoid at all costs any disruption of the peace ended in disaster for those who understood that they were being promised life saving help by the UN. In Kosovo, the international community in the form of NATO focused on preventing and reversing the ethnic cleansing, yet with such a blunt use of force that peace, security and justice all suffered. The priority of the intervening powers to avoid putting their own soldiers at risk had not changed since Srebrenica, but the policy which flowed from it took a very different form. The establishment of the International Criminal tribunal for the Former Yugoslavia (ICTY) focuses on justice yet it was established under the Security Council's powers to work for peace and security. While the ICTY has been denounced from many different angles, I argue that its most important achievement is existence; it is an empirical fact. Cosmopolitan criminal law exists, and in those three courtrooms in the Hague, as well as in Arusha, it conducts the daily business of putting people on trial for crimes against humanity and genocide. In chapter 5, I look at two cases at the ICTY in detail.

a) Peace before justice: Srebrenica and Dayton

“[T]he so-called safe area has become the most unsafe place in the world”

- Alija Izetbegovic, referring to Gorazde.¹

In July 1995 a crime against humanity was committed by Bosnian Serb forces against the Muslims who lived in Srebrenica or who had fled there for safety. This crime was committed under the noses of UN forces who did little to prevent it.

By the end of May 1992, Serb forces had occupied and ethnically cleansed a large part of Eastern and Western Bosnia, and the frontline which was established then was essentially stable until the summer of 1995. There were, however Bosnian Muslim enclaves which they had failed to defeat: Bihac, in the West, and Gorazde, Zepa, and Srebrenica in the East. Refugees fled to these enclaves, swelling their original populations.

Between May 1992 and January 1993, Muslim forces from Srebrenica attacked and destroyed Serb villages near the town. The Bosnian Government put pressure on the international community and UNPROFOR² to provide convoys of food and medical supplies to the civilians in Srebrenica. Two weeks after the first convoy successfully reached it, the Muslims launched an offensive against the Serbs in Bratunac: “Thus the integrity of UNHCR³ and UNPROFOR was undermined, further convoys were impossible, and the pressure for firmer action resumed.”⁴ The Serbs refused to allow aid through, arguing that it would help the military capability of the Bosnian army. The Serbian offensive against the enclaves intensified, and by February 1993, the situation in

¹ O'Shea, B. (1998). *Crisis at Bihac: Bosnia's Bloody Battlefield*. Gloucestershire, Sutton Publishing. P. 46.

² United Nations Protection Force

³ United Nations High Commission for Refugees

⁴ Honig, J. W. and N. Both (1996). *Srebrenica: Record of a War Crime*. Harmondsworth, Penguin.

Srebrinica was becoming desperate. A UNHCR report of 19 February described the situation in Srebrenica:

There is no food such as we know it. They have not had real food for months. They are surviving on the chaff from wheat and roots from trees. Every day people are dying of hunger and exhaustion. The medical situation could not be more critical. People who are wounded are taken to the hospital where they die from simple injuries because of the lack of medical supplies. They have problems of epidemic proportion with scabies and lice.⁵

When General Morillon of UNPROFOR visited the besieged town, the inhabitants organised a protest by the women and children to prevent him from leaving. They demanded protection. Morillon jumped on top of his armoured car and spoke to the crowd: "We will not abandon you".⁶ The world saw this pledge on their evening news bulletins.

Following the 1991 Gulf war, a safe-haven had been declared by the victorious coalition in order to protect the Kurds in Northern Iraq from the Saddam regime. The relative success of the policy had, according to Honig⁷ been dependent on three factors which did not apply in Bosnia. First, the safe haven was imposed by a coalition which had just dealt a crushing military defeat to the Iraqi army in Kuwait; therefore there was no need to negotiate with the Iraqi regime, nor to obtain its consent, nor to appear neutral between it and the Kurds. Second, the safe haven was large, and it bordered one of the allies enforcing it; so forces could easily be deployed and withdrawn. Third, the terrain was relatively open which made air cover easier.

By March 1993, Srebrenica was in danger of imminent defeat. On April 16, 1993, the Security Council passed a resolution which designated the town of Srebrenica

p. 80

⁵ Honig (1996) p.82.

⁶ Dispatches (1996) *A Bosnian Betrayal* Channel 4, London.

and its surrounding area to be a 'safe area'. The resolution, however, was half-hearted and vague. Britain, France and Spain, the countries whose troops were most likely to be used in any action guaranteeing safety were nervous.

They made sure that Srebrenica was turned into a 'safe area', as opposed to a 'safe haven'... The difference under international law was that safe havens need not depend on consent of the warring parties and could be enforced, while safe areas were based on consent.⁸

It seems, however, that the world did not really notice this nice distinction; it was understood that the UN was guaranteeing the safety of civilians who lived within these enclaves. But the Security Council had only placed a duty upon the Bosnians and the Serbs to keep these areas safe; UNPROFOR's role would be to monitor the humanitarian situation.

The UN was always in a contradictory situation. No country was willing to commit soldiers capable of fighting against those who were doing the ethnic cleansing. In the absence of such a force, all international intervention had to gain the consent of all sides in the conflict, since everyone possessed a *de facto* veto on their activities. There was an arms embargo on all sides, which impacted more heavily on the Bosnians, since the Serbs controlled the JNA⁹.

Since Serb consent had to be won for any policy, a condition of the granting of 'safe areas' was to be the disarming of Muslim forces in the name of creating a 'de-militarized zone'. Serb forces were unwilling to allow the UN to transport supplies to the enclaves if they were being used as bases for the Bosnian Army. On 17 April 143 lightly armed Canadian soldiers entered Srebrenica. They were not mistaken, by the desperate

⁷ Honig (1996) p. 99.

⁸ Honig (1996) p. 104. Much of this account of the events in Srebrenica is based on this book.

⁹ Yugoslav National Army

inhabitants, for liberators. The Canadians were in a difficult position. They could not defend the town against a serious attack. They were supposed to disarm the Muslims, which, if at some time in the future they were forced to withdraw, would leave the Muslims more defenceless than they were already. However, the Serbs withdrew one and a half kilometres and stopped shelling. Srebrenica appeared to have been saved, and the world's press looked elsewhere for their stories.

On 3 March 1994 570 Dutch troops relieved the Canadians in Srebrenica. Most of their ammunition had been delayed when the ship carrying it to Croatia had broken down; by the time it arrived, the Serbs declared that the Dutch already had enough supplies, and declined to let it through. Convoys of fuel and food were also often delayed by the Serbs. Following a NATO air-raid in November 1994, the Serbs took 70 Dutch soldiers hostage; General Mladic came to visit them, arriving in a Mercedes Jeep which the Serbs had previously confiscated from a Dutch convoy. They were eventually released. During 1995, the Serbs continued systematically to undermine the operational capability of the Dutch force, particularly by restricting food and fuel supplies. Morale amongst the Dutch soldiers was poor.

The final Serb attack on the safe area of Srebrenica began on Tuesday 6 July 1995. There was much small arms fire and shelling recorded by the Dutch from their observation posts which surrounded Srebrenica. One observation post in particular came under attack, and the soldiers inside it surrendered to the Serbs, who, eventually allowed them to go back towards their comrades in the town in their armoured car. On their way back, they encountered a Muslim roadblock which they drove through without stopping; one soldier, Raviv van Renssen, was shot in the head and killed. A second observation

post was attacked and overwhelmed by the Serb forces; the Serbs gave them a choice. Either they could make their way back to their unit in Srebrenica or be taken prisoner. The soldiers opted to be taken prisoner. The Dutch Lieutenant-Colonel Karremans did not yet understand that Srebrenica was in danger of falling to the Serb forces. By Saturday, the Bosnian Army was decisively outgunned; they wanted NATO air strikes against Serb forces. Their strategy was to manoeuvre the Dutch into the line of fire, so that they would be forced to call for air support. They therefore made it difficult for the Dutch to withdraw from their observation posts into the town. But the Dutch soldiers preferred to surrender to the Serbs, who treated them well, than to remain in their positions.

At 2200 on Sunday night, the highest UN commander in the former Yugoslavia, French Lieutenant-General Bernard Janvier ordered the Dutch battalion to position their armoured cars around Srebrenica in order to stop the Serb advance. From Zagreb, Janvier and Yasushi Akashi, the UN Secretary-General's Special Representative, sent an ultimatum to the Serbs, to withdraw from Srebrenica and release the captured Dutch soldiers, or else air support would be employed.

On Monday morning, there was increased shelling of the town, the Muslim civilians and refugees, and the Dutch soldiers, followed by a relative lull. By early evening, Serb soldiers were lining up above Srebrenica ready to advance into the town. Muslim civilians began to flee from the town towards the north. At 1830 the Serbs began to advance. Many Muslim civilians streamed towards the Dutch compound for protection, and broke into it. The Bosnian army was trying to stop civilians from withdrawing from the town to the base; they still wanted to force the Dutch to fight, and

therefore to call for air support. Most of the refugees remained in Srebrenica during the night of 10 and 11 July.

The Dutch requested air support at 1900 during the Serb attack. Following much discussion and delay, Janvier decided that NATO would be ready to attack from the air by 0600 in the morning. The Dutch soldiers were informed that NATO had given an ultimatum to the Serbs that if they did not withdraw they would come under heavy air attack first thing in the morning. Janvier and Akashi, however, had only agreed to the air attack if the Dutch troops were attacked first.

Karremans announced to the Bosnian army and the civilian town council that the Serbs had been warned to withdraw on the threat of NATO air strikes. The Bosnians didn't trust Karremans. Major Fahrudin Salihovic, of the Bosnian army, twice asked Karremans if he could guarantee that the attack would take place. Karremans twice answered "Don't shoot the piano-player", which was translated by the interpreter as "don't trouble the bringer of good tidings".

NATO aircraft were in the air from 0600, ready to attack. All in Srebrenica waited for the attack. UNPROFOR commanders were waiting to be contacted by the Dutch if they were being attacked by the Serbs.

The NATO aircraft, which had been airborne since 0600 were forced to return to their base in Italy by 11.30. The Serb forces were made aware of this from radar bases in Serbia. Shortly after 1100 the Serb attack resumed. The Dutch resumed the evacuation of refugees to their base. There were some limited NATO air attacks that afternoon. The Serbs issued an ultimatum of their own. If the air attacks were not stopped, then the captured Dutch soldiers would be killed and the refugees and Dutch battalion would be

shelled. The Dutch Government, Akashi and UNPROFOR quickly halted the air attacks. The Dutch withdrew to their base and Karremans opened cease-fire negotiations with the Serb forces.

By the evening of 11 July, there were around 25 000 Muslim refugees, mostly women and children crowded into the Dutch base.

The highly organised and pre-planned Serb 'deportation' operation began. Ratko Mladic himself was in Srebrenica on the 11th July, with a television camera crew, to organise the cleansing of the town in order to make, as he told the cameras, a present to the Serbian nation. His meeting with Karremans was filmed: Karremans raised a glass to toast the Serb victory and was ordered by Mladic to return with 'representatives' of the Muslim refugees in order to organise the 'deportations'.

The Muslim men were separated from the women. The men were taken in buses towards Bratunac.

Over the next few days, Dutch soldiers held hostage in Bratunac reported seeing a number of buses filled with male prisoners. Most of the men sat with their heads between their knees, and when they did look up their expressions were of terror. The Dutch hostages also reported hearing frequent gunshots, particularly from the direction of the football pitch.¹⁰

The women and children were deported to Kladanj, in Bosnian Government territory.

The men who had fallen into Serb hands were murdered. The Red Cross lists 6546 people from Srebrenica missing, virtually all of them men.

Perhaps Srebrenica could have been saved if the Dutch troops had been willing to risk their lives in a heroic stand; perhaps it could have been saved if Janvier and Akashi had been more willing to offer air support; perhaps it could have been saved if other states had offered more troops as the Netherlands had done; but the UN's humiliation in

Srebrenica was not an isolated disaster. The UN stood by and watched the ethnic cleansing in Srebrenica as it did in the rest of Bosnia; as it watched the genocide in Rwanda. In both cases it had intelligence reports telling it what was likely to happen but it was unable or unwilling to protect people. In Rwanda, too, there were television pictures showing thousands of desperate, frightened people crowding around UN bases, and UN soldiers retreating, leaving those people to their fate. So failure at Srebrenica, while not inevitable, mirrored failure elsewhere. Most towns in the '*Republika Srpska*' didn't even receive the token protection and the publicity which was afforded to Srebrenica, but were cleansed un-noticed by the world's media.

Since the UN and the states who provide its forces were unwilling to risk the lives of their soldiers in an operation to prevent ethnic cleansing, then ethnic cleansing was carried out unhindered. There was much discussion at the time of the military and political impossibility of putting an international force in Bosnia that was capable of defending the victims of ethnic cleansing. There was also much political obfuscation; politicians argued that there were evils on all sides in the war. Douglas Hurd, the British Foreign Secretary argued that it was impossible to go into other people's countries and run them; this was the lesson learned from the British empire. The Balkans were portrayed as an exotic and inherently unstable place, and therefore, undeserving of help.

Given that a force to prevent ethnic cleansing was not forthcoming, then the role which the UN gave itself in Bosnia was one of observation and attempting to slow down and ameliorate the effects of ethnic cleansing. The UN forces found themselves in the position of constantly having to negotiate at a number of different levels. It was necessary to negotiate with leadership of the Bosnian Serbs; it was also necessary to

negotiate with each group of Chetniks at each road-block. While the UN did have, as its trump card, the possibility of calling in air support, which was able genuinely to hurt the Serb forces, the Serbs developed trump cards of their own. They were able to take UN soldiers as hostages, and threaten the increased shelling of civilians. The UN had no answer to these threats.

A flavour of the kind of negotiations which were constantly taking place can be obtained from a letter which Sir Michael Rose, the commander of UPROFOR sent to Ratko Mladic, the general in charge of Serbian ethnic cleansing in Bosnia.¹¹

Dear General,

Following your telephone conversation today with Brigadier-General Brinkman [General Rose's chief of staff in Sarajevo], I would like to confirm that the UN always regrets the need to use force in its peacekeeping mission. As Commander B-H Command, I fully agree with you that we must in the future avoid all situations which necessitate the use of force, whether it be applied from the ground or the air. We can only do this through closer liaison and co-operation. As you know UNPROFOR... is in B-H to help return this country to peace through peaceful means. It is not part of our mission to impose any solution by force of arms. We are neither mandated nor deployed for such a mission.

However, you will understand that everyone has the right of self-defence. If our troops are deliberately engaged by fire, then we have to respond, no matter who it was that opened fire. I am sure that as a soldier you will understand this point of view.

I believe that we must now return to the status quo ante in terms of the relationship between UNPROFOR and the Bosnian Serb Army. These are difficult times for everyone, and we must not allow local tactical-level incidents to undermine the road to peace. I urge you now to give orders accordingly.

Yours Sincerely,
Michael Rose.

Rose, the SAS hero, defended his stance in a letter to *The Times* on the same day that they published his letter to Mladic. It isn't his fault, he argues, he is merely carrying out the orders of his political masters.

¹¹ *The Times*, 2/11/1994, London, p. 15

The mandate, and therefore the mission, is principally one of peacekeeping, not peace enforcement. The primary mission of the UN in Bosnia remains that of assisting UNHCR and other humanitarian agencies to sustain the lives of millions of suffering people in the midst of a war...

It is not within the mandate or capability of UNPROFOR to impose a military solution on the country. Injudicious use of force would take the mission across the line which divides peace from war...

If this happened, the enclaves of eastern Bosnia would fall, Sarajevo would return to the horrors of the last two winters, and the future of the Croat Muslim Federation would be put in doubt...¹²

During late summer 1995, all sides in the conflict made significant gains. The Serbs took and cleansed the 'safe areas' of Bihac, Srebrenica, Zepa and Gorazde. The Croats took the Krajina from the Serbs and there, committed one of the biggest acts of ethnic cleansing of the whole war. The Bosnian army re-took some territory in central Bosnia. The Americans sensed that the new situation could be transformed into some sort of equilibrium, and, for the first time in the war, NATO launched a serious and sustained assault from the air against Serb forces.

In November 1995, the Americans organised the final negotiations at an air force base in Dayton, Ohio. They refused to deal with the indicted Mladic and Karadzic, preferring to negotiate with the real Serbian leader, Slobodan Milosevic. The Dayton deal was agreed on the 12th November. On the one hand, Milosevic came under severe American military and diplomatic pressure to make the deal; on the other hand, the deal allowed the Serbs to keep the territory of Bosnia which they had cleansed, and allowed Croatia to keep the Krajina. Dayton ended the war, but on the basis of accepting the reality of the ethnic cleansing of a large proportion of Bosnia.

There were cosmopolitan institutions and forces positioned in Srebrenica and in the rest of Bosnia to which the victims of the ethnic cleansing and the outside world

¹² *The Times*, 2/11/1994, London, p. 15

looked to stop the killing and the terror; there were armies and air forces; blue helmets and red crosses; diplomats, politicians and generals; there were promises and guarantees. Yet in this case, the cosmopolitan institutions were nothing more than a form which disguised an old fashioned realist content. In this case, the radical critique of cosmopolitanism looks persuasive. Cosmopolitanism was the form of appearance of the great powers. The policies followed by them were based on little more than calculations of self-interest; there was no political will to defend human rights or to stop or reverse the huge injustices which were perpetrated against the Muslims of Bosnia. The policies of the great powers were hidden under a façade of cosmopolitan forms and institutions. Even with the preponderance of the appearances and forms of cosmopolitanism, there were no sparks or flashes of genuinely cosmopolitan response. In Bosnia, what existed, contrary to appearances, was ordinary power politics.

b) Peace and justice without risk and at a price: Kosovo

By 1999, the policy of the west in relation to ethnic cleansing had changed. During the autumn of 1998 and the winter of 1999, tension increased in Kosovo between the JNA, the ethnically Serb minority population, the Kosovar Albanian majority there, and the KLA, which was becoming better organised and gaining more support in its armed rebellion against the Yugoslavian state.

International monitors were sent into Kosovo in October 1998. In January, in the village of Racak, armed Serb police units killed 45 civilians. Twenty-two unarmed men were shot in a gully, 23 others, including women, were killed in the streets. It became clear to the monitors that the Serb strategy was to intimidate civilians into fleeing

strategically important areas. As well as police units, the regular army was now involved.¹³ Reports of particular incidents of ethnic cleansing coming out of Kosovo accelerated.

On March 19th 2000, the talks began at Rambouillet. Madeleine Albright, the American Secretary of State proposed that the province of Kosovo was given autonomy but short of independence, and that NATO troops should be allowed in Kosovo to guarantee that autonomy and freedom from ethnic cleansing for the population. Though the Kosovars wanted independence, they signed the agreement which kept them within the Yugoslav state. The Serbs were unwilling to sign. The talks went on for three weeks, while the process of ethnic cleansing on the ground in Kosovo gathered pace. Milosevic wanted to pursue the same strategy which had allowed the Serbs to cleanse half of Bosnia. He wanted to negotiate, make agreements and cease-fires, while at the same time his troops and paramilitaries were doing their irreversible work. It was the American insistence on NATO troops being allowed into Kosovo to guarantee the agreement which Milosevic could not agree to. They were given an ultimatum; agree to the deal or face air strikes. Milosevic preferred air strikes to erosion of his sovereignty in Kosovo.

NATO began air attacks on the 24th March. The Serbs saw this as a signal to begin an uninhibited campaign of ethnic cleansing against the entire Kosovar population. While the bombing campaign slowly accelerated, hundreds of thousands of Kosovars were terrorised out of their homes and out of the country. They were sent across the borders, stripped of their money, their homes, their identity papers and their citizenship. Hundreds of thousands arrived in refugee centres in Macedonia and Albania.

¹³ Panorama *The Killing of Kosovo* BBC1, 28/04/99

NATO was unwilling to send any forces into Kosovo to defend the population, since this might have resulted in the deaths of some of their soldiers. Instead, they clung to the strategy of bombing strategic targets in Serbia until Milosevic agreed to the terms of the Rambouillet agreement.

In Kosovo there was the political will from powers to respond with force to the threat of ethnic cleansing. NATO had changed its stance since the campaign in Bosnia. It now demonized Milosevic, a policy which contrasted with its previous attempts to build him up into a position where he could control and 'civilise' the Bosnian Serbs. NATO did not allow its troops to be put in a position where they could be taken hostage. The policy which it pursued in Kosovo was simply the blunt use of enormous force. The result in the end was that, unlike in Bosnia, the campaign of ethnic cleansing was unsuccessful; the Kosovars were allowed to go back to their homes with some guarantees of safety. But the cost was enormous; to the Kosovars, who had to endure the most appalling campaign of ethnic cleansing before the Serb forces finally conceded defeat and to the Serb people who had to endure the bombing. While there was some component of cosmopolitan motivation in the western response to the ethnic cleansing of Kosovo there was also a large component of self-interest, particularly the wish to avoid 'domino' destabilisation and mass movements of refugees towards the west. The over-riding concern to avoid any risk to western soldiers undermined the effectiveness of what was possible in terms of protecting populations from the ethnic cleansers. In Kosovo the great powers used less cosmopolitan forms than they had used in Bosnia; NATO rather than the UN, aerial bombing rather than peace-keeping forces, but the content of the policy was more effective in aiding the victims of ethnic cleansing.

c) Omarska: an intimate concentration camp

Before looking in detail at the setting up of the international court, another of the strategies employed by the international community to address events in the former Yugoslavia, I will give a brief sketch of the kinds of crimes which were being committed in Bosnia in 1992.

In 1997, Rezak Hukanovic published his memoir¹⁴ describing his experiences at Omarska. Omarska had been an iron mining and ore processing complex and was near Prijedor, a small Northwest Bosnian city. It was officially called an 'information centre' for men suspected of being members of the Government Army. In reality its inmates were Bosnian Muslim or Croatian civilians plucked out of their homes during ethnic cleansing. They were chosen purely on the basis of their designated nationality or ethnicity; Omarska was a concentration camp.

Hukanovic's memoir of Omarska is written in the third person, centred on a character, clearly himself, called Djemo. Djemo was at home in Prijedor, worrying about his wife's unhappiness with his tendency to flirt with women and remembering Serb against Muslim football matches, where the losers paid for the beer and food at the following barbecue. He was taken from his home at gun point by a Serb militia to a building where people were interrogated and beaten. From there he was taken to Omarska. He estimates that over the next two days more than three thousand inhabitants of Prijedor arrived there, including his son and some of his cousins.¹⁵

¹⁴ Hukanovic, R. (1997). *The Tenth Circle of Hell*. London, Little, Brown & Co.

¹⁵ Hukanovic (1997) p. 26

All through his memoir he comes across people he knows, both prisoners and guards. There is no bureaucratic distancing or pseudo scientific de-humanisation; Omarska was a very intimate concentration camp.

The prisoners were crowded together and systematically starved. There were routine and constant beatings, in the dormitories, on the way to and from the canteen or the latrines; all the time. The guards used clubs, thick electrical cable, rifle butts, fists, boots, brass knuckles, iron rods.

Prisoners were tortured for false confessions; a doctor who had no cellar was forced to admit that he stole drugs from his clinic and hid them in his cellar; a man who was widely known to suffer from progressive blindness admitted that he had been a sniper.¹⁶ The sounds of these torture sessions were heard daily from the dormitories. In the hot summer, the prisoners were kept thirsty; the guards would throw small bottles of water into the dorms because the frantic struggle between the prisoners amused them. The prisoners were routinely forced to sing Chetnik songs.

When somebody took a leak, the others gathered around to cup their hands and catch the urine, wetting their chapped lips with it and even drinking it.¹⁷

A group of ten prisoners were taken out by drunken guards and ordered to strip naked. One man who had been a prisoner for quite some time refused to strip. The guards knocked him to the ground and cut off his sexual organ and half of his behind with a knife; they then directed a strong jet of water from a fire hydrant at his wounds and later doused him with petrol and set him alight in a garbage container.¹⁸

• The prisoners were completely and constantly infested with lice.

¹⁶ Hukanovic (1997) pp. 28-9

¹⁷ Hukanovic (1997) p. 32

¹⁸ Hukanovic (1997) pp. 33-5

Every night, after midnight, the guards called out the name of one or more prisoners. These prisoners were taken out and beaten bloody, often their bones broken and puncturing their skin. A sixty-year-old man was ordered to rape a young woman; he refused, and after being tortured was killed.

Hukanovic tells of a soldier by the name of Zoka, who would ask a prisoner which eye he would like to keep, or which ball, and would remove the other one.

The white building at Omarska, known as the White House was used for routine torture and killing. Djemo was taken away from his son to the White House on the 10th of June 1992. He was beaten by four men, completely drunk. He was ordered onto all fours “just like a dog”¹⁹ and hit incessantly by a man named Ziga on the back of the head with a club “that unfurled itself every time he swung it to reveal a metal ball on the end.”²⁰ A man called Saponja who knew Djemo quite well appeared and began kicking him in the face with his boot. All through the torture the guards were screaming abuse and making jokes. Djemo, unlike many, survived the White House and was sent back to the dorm.

One of the prisoners was a Maths teacher called Abdullah Puskar. A guard, who had been Puskar's student often came to collect him at night. He harangued him as he beat him. “I listened to you long enough, now you'll listen to me for a while.... I'm gonna beat that math out of you or die trying!”²¹ It was Puskar and not his student who died.

Hukanovic tells the story of a few guards who were good, honest men. “But after a couple of days at Omarska, most such men were sent to the front lines... That was the last anyone would hear of them.”²²

¹⁹ Hukanovic (1997) p. 62

²⁰ Hukanovic (1997) p. 62

²¹ Hukanovic (1997) p. 74

²² Hukanovic (1997) p. 77

He tells of many more brutal tortures and deaths; always humiliating and unimaginably painful. It is clear that at Omarska murder and torture were routine. Bodies were regularly taken away in yellow trucks.

Djemo was taken from Omarska on a nightmare crowded, thirsty bus journey to a camp called Manjaca. Here there were also terrible conditions, crowded, hungry, thirsty, lice-ridden; but brutality, while it still existed was less tolerated by the commander-in-chief of the camp, who interrupted a beating with the words "Enough. That's the kind of thing you were supposed to do in Omarska, but you can't do it here."²³ There were visits from the Red Cross, who provided diesel for the collection of water, but the prisoners still got little and dirty water.

In the end, Djemo was released in an exchange of prisoners organised by the Red Cross and UNPROFOR. He and his fellow prisoners alighted from the buses into a scrum of the world's press and TV reporters, and then went into exile.

Ed Vulliamy was a journalist who was in the first group of outsiders, press, Red Cross or United Nations, to see Omarska on the fifth August 1992. He quotes a witness, Nedžad Jacupovic, who survived the White House, as follows

They would bring people from the big red hut at eight in the evening, forty of them each night, to the White House. There, they would beat them until they were dead; it could take a day, three days or five days, ripping clothes off with knives, cutting people and then just kicking and beating them to death over a period of days. Then they would arrive with lists of others in the White House who were not yet dead, for execution. They would record the men's details, take them out, one every fifteen minutes, towards the Red House, where they were butchered. I was counting the numbers; sometimes eighteen, twenty or thirty; the record was forty-two. They were killed just in front of my windows.²⁴

Vulliamy quotes another survivor of the White House, Sakib R., who calculated that 612 men disappeared from the hut during twelve days in July 1992:

²³ Hukanovic (1997) p. 111

²⁴ Vulliamy, E. (1994). *Seasons in hell - Understanding Bosnia's War*. London, Simon and Schuster p. 109

I saw people loading the dead onto lorries and they were dropping bodies down the mine shaft. On one occasion, twelve Croats were taken out to the toilet. I went in there, and saw bits of their bodies on the floor.²⁵

Vulliamy says that “[t]he testimonies are willing and endless, but the evidence these two men submit is typical, cogent and can be corroborated.”²⁶ “One survivor... estimates that he was personally forced to help deposit 600 bodies down the mine shaft at Omarska”²⁷ Vulliamy estimates that something like six thousand men were at Omarska at any one time, and several thousand of them were brutally murdered. He adds that there were other similarly brutal camps, for example one at Kereterm, established at a disused tile factory on the edge of Prijedor, known as 'Room Three' and the Luka camp outside Brcko. Here, a university lecturer called Mirsad was held and he told the following story:

the guards allowed a pretty young woman called Monika to torture prisoners. She took pleasure in the task and laughed as she performed it: ‘Monika was the daughter of a local whore, whom we all knew. She was eighteen years old, and was the most cruel torturer of young men. She would break a glass bottle and cut open their stomachs while the guards watched and laughed. She had a soft, gentle face. We never expected someone like that to do such things. But she enjoyed doing it....’²⁸

Hukanovic tells that one day everyone, including the beaten and the sick, were taken out onto the tarmac and stood against a building. There were, he estimates about three thousand of them.

The soldiers positioned themselves around the prisoners, ready to fire. One guard, known for never parting from his machine gun for even a second, climbed to the roof of the building across the way and began loading the magazine of his gun with cartridges.... he aimed the barrel at the runway and lay down next to it, taking aim at the men.... the guards kept their guns trained on the prisoners for over an hour. Then they were all taken back to the dorms.²⁹

Omarska was absolutely different from Bauman's picture of the genocide of the Jews; the picture of the principles of scientific rationality coldly and dispassionately

²⁵ Vulliamy, E. (1994) p. 111

²⁶ Vulliamy, E. (1994) p. 111

²⁷ Vulliamy, E. (1994) p. 108

²⁸ Vulliamy, E. (1994) p. 113

²⁹ Hukanovic (1997) p. 50-1

designating the goal of extermination and a bureaucratically and technologically efficient execution of the plan. At Omarska, killing was passionate and inefficient. Many of the guards knew personally many of the victims. It often took hours or days to kill a single prisoner. It was an intimate concentration camp.

Hukanovic tells us that

On Weekends regular troops from Banja Luka came to the camp. The guards called them specialists, and they were indeed specialists at breaking arms and legs, tearing out organs, and smashing skulls against walls. The weekends at Omarska were orgies of blood. One day... one of the regulars said, loudly, so everyone could hear: 'Today is my twenty-fifth birthday, and I've only killed twenty-three Muslims.'³⁰

Regular soldiers came to Omarska at the weekends to torture and kill Muslims. Was this a way to wind down after a hard week at the front?

The main objective of the concentration camps, especially Omarska, but also Keraterm, according to a UN commission of experts,

seems to have been to eliminate the non-Serbian leadership. Political leaders, officials from the courts and administration, academics and other intellectuals, religious leaders, key business people and artists – the backbone of the Muslim and Croatian communities – were removed, apparently with the intention that the removal be permanent. Similarly, law enforcement and military personnel were targeted for destruction.³¹

When Djemo was being taken to freedom, one exchange of prisoners didn't come off. The prisoners were taken to a cell block in the prison of a military barracks. Their guards went off to sleep, leaving the prisoners in the hands of the locals, the 'Knin Boys'. They were left in the hands of this gang for a day and a night, who tortured them, humiliated them and forced them to sing Chetnik songs. They were allowed to amuse themselves with a bunch of Muslims while they were in town, while the guards rested.

Vulliamy's story about the young woman torturer reinforces this picture of killing and beating for recreation. In very many of the testimonies of brutality the perpetrators

³⁰ Hukanovic (1997) p. 52

³¹ *Final report of the United Nations Commission of Experts established pursuant to Security Council Resolution 780 (1992) para. 175. Cited in Honig (1996).*

are drunk and laughing, enjoying themselves. They amuse themselves by forcing prisoners to sing for them, and by haranguing them with witty and ironic comments while they are murdering them.

There is an abundance of sexual torture, sometimes one prisoner forced to torture another. One prisoner was forced to bite another prisoner's testicles off.

On May 7 1997 Dusko Tadic was found guilty of crimes against humanity. "He was found to have played a part in almost all of the assaults on prisoners described by [Omarska] survivors during the one year trial."³² The detailed judgement upholds the view of Omarska which I have summarised from Vulliamy and Hukanovic. The judges said that "women who were held at Omarska were routinely called out of their rooms at night and raped". One woman was "taken out five times and after each rape she was beaten."³³

³² Traynor, I. (1997). War crimes trial finds Bosnian Serb guilty. *The Guardian*. 08/05/1997 London p. 3.

³³ Vulliamy (1994) p. 117

d) The UN Response: The International Criminal Tribunal for the Former Yugoslavia (ICTY)

In the summer of 1996, a NATO spokesman was widely quoted as saying that “Arresting Karadzic is not worth the blood of one NATO soldier.” Geoffrey Robertson comments that “[t]his was not so much a case of dereliction of duty as of correctly divining the real purpose of the Hague Tribunal in the minds of the Security Council representatives who set it up, which was never to put major criminals like Karadzic and Mladic behind bars, but to pretend to an anxious and appalled world that something was being done.”³⁴ David Forsythe, agrees, arguing in *Critical Law Forum* that the Tribunal was set up fundamentally in order to placate public opinion, and lacked the support from those states which set it up, which it required to be successful. Britain and other states failed to give this support since it might have interfered with diplomatic efforts to end the conflict.³⁵ However, he concedes that it would not be entirely useless: “The equivalents of Goering and Eichmann, much less Hitler, will not be tried, but neither will they be free to visit Disneyland on vacation.”³⁶

However social structures have emergent properties and they are shaped by social agents; they have possibilities which are different from those intended; they have the possibility to grow and develop. Institutions do not always become what those who conceived of them had hoped. The *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) was set up with a certain degree of autonomy from the Security Council. This was inevitable, since it was set up as a court of law in the western

³⁴ Robertson, G. (1999). *Crimes against Humanity*. London, Penguin. P. 265

³⁵ Forsythe, D. P. (1994). “Politics and the International Tribunal for the Former Yugoslavia.” *Criminal Law Forum* 5(2-3): 401.

³⁶ Forsythe (1994) p. 419

tradition, and such courts necessarily have some degree of independence from those powers in whose name they operate. The separation of powers between the executive, the legislators and the judiciary are deeply ingrained principles, even if there are many mechanisms by which the separation can, in practice, be eroded or diminished. Even if the ICTY was set up by the great powers in order to feign a concern for justice, that does not necessarily limit the existing institution to remaining a token gesture. The Nuremberg process was given life by the young idealistic lawyers who made it work, and who, as far as was possible, strove to use it to leave a set of precedents of cosmopolitan criminal law in place.³⁷

Both the prosecutors at the ICTY, and the judges, have a belief in the importance of the work they are doing, and they do it with commitment and energy. Many of the judges, like, for example, Antonio Cassese, are well renowned professors of law; people who have been writing, almost since Nuremberg, about the possibility and necessity of international criminal law. They were brought in from an academic wilderness, and given an institution to build. What the judges lack in actual trial experience, they make up for in enthusiasm and vision. At the Tadic appeal, there was an instructive little exchange. Defending Tadic was William Clegg, the same man who had defended Sawoniuk. He was presenting an argument about what constitutes an international conflict. He made an analogy with lend-lease during second world war; he said, rather clumsily, “The Americans lent *us* armaments and money but this didn’t necessarily mean that they were themselves participants in the conflict”. Judge Shahabuddeen pulled him

³⁷ Franz Neumann, Otto Kirchheimer and Herbert Marcuse, for example, were all members of the prosecution team at Nuremberg. Salter, M. (2001). 'The visibility of the Holocaust: Franz Neumann and the Nuremberg trials'. in *Social Theory After the Holocaust*. R. Fine and C. Turner (Ed). Liverpool, Liverpool University Press pp 197-218

up immediately, saying that he should speak more clearly: he should not say ‘us’, but Britain; he should remember that people will be reading these transcripts in fifty years’ time, and he should express himself in such a way as to make himself intelligible to those future students of international law. Shahabudden was aware that the discussion in the Tadic case regarding the definition of an international conflict was ground-breaking; the court was making law for the future. Even if the ICTY was set up by the Security Council as an empty gesture, those involved in making it work were determined to make it work. Even if it was to end in failure, they were thinking about future generations of lawyers and students who might be reading those transcripts. The same can be said for the prosecutors: “What Richard Goldstone and his successor... have demonstrated is the optimistic fact that enterprises of this sort have a tendency to develop a momentum of their own”.³⁸ International criminal law can never be only an expression of the will of the great powers. It can be influenced, limited or corrupted by them; but it is a sphere of social life which necessarily has some degree of autonomy from the particular interests of the powerful.

Yugoslavia broke up in the summer of 1991. Croatia and Slovenia declared independence and fighting broke out between Croats and Serbs in Croatia. Serbia sent arms and supplies, and the JNA, the Yugoslavian army, to Croatia. In October 1991 Bosnia held a referendum on independence, and the Bosnian Serbs took control of ‘their’ territory in Bosnia. During the spring and summer of 1992, the Serbs began the process of ethnic cleansing against the Muslims in Bosnia.

In February 1992 the Security Council of the UN adopted resolution 721, authorising a special peacekeeping force, UNPROFOR for Bosnia. The commission on

³⁸ Robertson, G. (1999) P.267

Human Rights convened the first exceptional session ever on August 13th 1992 to discuss the ethnic cleansing. A Special Rapporteur was appointed in August 1992, who subsequently issued four reports to the General Assembly and the Security Council.³⁹

The first one, on August 28th 1992, confirmed that ethnic cleansing had been pursued throughout Bosnia by Serbs, that there had been torture and systematic execution and that three thousand Muslims had disappeared after the fall of Vukovar. The second report, in October 1992, following a visit by the Rapporteur to Bosnia, stated that Muslims had clearly become victims of aggression and ethnic cleansing; displaced persons were in a desperate situation especially in Travnik area; before their arrival in Travnik, many had been taken to the front lines, subjected to beatings, robbery, rape and sometimes shooting; there had also been ethnic cleansing in Pijavija, Prikepolje, and Proboj. The third report, on November 17th 1992 highlighted violations of the various parties' legal obligations under international law. Ethnic cleansing, it argued, followed the political objective of the Serbian nationalists of the creation of a Greater Serbia. It concluded that 1.5 million out of 4 million Bosnians had become refugees, 75% of latter being children and elderly. The fourth report, the most comprehensive, concluded that the serious and large scale violations of human rights and international humanitarian law were not by-products of war but were deliberate policy of the Serbs. It also reported that there was discrimination against Serbian civilians in Croatia and against Albanians in Kosovo.

³⁹ the four reports are cited in **Bland M.A.** (1994) 'An Analysis of the United Nations International Tribunal to Adjudicate War Crimes Committed in the Former Yugoslavia: Parallels, Problems, Prospects' *Indiana Journal of Global Studies* **2**(1), <http://www.law.indiana.edu/glsj/vol2/tocv2i1.html>.

Dame Ann Warburton was sent by the European Community to Yugoslavia in December 1992 and January 1993 and she reported on February 3 1993 to the UN Secretary-General. She found that the rape of Muslim women had been perpetrated on a wide scale and in such a systematic way as to be considered part of an intentional war strategy. She estimated that there had been 20 000 rapes, but said that it could be between 10 000 and 60 000, with about 1000 pregnancies. They reported testimony that “a repeated feature of Serbian attacks on Muslim towns and villages was the use of rape, often in public or the threat of rape, as a weapon of war to force the population to leave their homes.”⁴⁰

On February 22nd 1993 the Security Council adopted resolution 808 which formally decided that an international tribunal should be established for the former Yugoslavia. On May 25th 1993 the Security Council adopted Resolution 827 formally establishing the tribunal.

The tribunal was set up under the UN charter in relation to keeping the peace, not directly in relation to justice or to prosecuting crimes against humanity. It was established under authority of Chapter VII of the UN Charter, which provides that the Security Council shall “decide what measures shall be taken... to maintain or restore international peace and security.” Under Article 48(1) of the Charter “[t]he action required to carry out decisions of the Security Council for the maintenance of

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Joyner, C. C. (1994). “Enforcing human rights standards in the former Yugoslavia: The case for an International war crimes tribunal.” *Denver Journal of International Law and Policy* 22(2,3): 239, p. 252.

On 22 February 2001 three men, Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic were found guilty of crimes against humanity at the ICTY for organising and perpetrating mass rape and sexual slavery. The judgement of the 11 month trial confirmed that in the summer of 1992 rape houses had been set up in sports halls and other places. Rape was seen by the judges as method of ethnic cleansing, aimed at spreading terror, and also at impregnating Muslim women with ‘Serb’ babies. **Osborn, A.** (23/01/2001). ‘Mass rape ruled a war crime’. *The Guardian*. London p. 2.

international peace and security shall be taken by all the Members of the United Nations.” All member states were thus obligated to adhere to requirements imposed on states in the Security Council resolutions governing the activities of the tribunals.⁴¹

The Security Council argued that atrocities in Bosnia constituted a threat to international peace and they argued that the tribunals would contribute to the restoration of peace. It was on this basis, pursuant to chapter VII of the UN Charter, that the Security Council decided in its Resolutions 808 and 827 to establish such a tribunal. The singling out of violations of humanitarian law as a major factor in the determination of a threat to the peace creates an important precedent. The establishment of the tribunal as an enforcement measure under the binding authority of chapter VII, rather than through a treaty creating an international criminal court whose jurisdiction would be subject to the consent of the states concerned, argued Meron, may foreshadow more effective international responses for violations of international law.⁴²

The Security Council’s resolution binds all member states to co-operate with the tribunals. The general obligation of states to co-operate with the Tribunals can be found in operative paragraph 4 of Security Council Resolution 827 and operative paragraph 2 of Resolution 955, the resolutions establishing the Yugoslav and Rwanda Tribunals, respectively, and setting forth their structure, jurisdiction and procedures. These provisions both read as follows:

[The Security Council] *Decides* that all states shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take

⁴¹ Kushen, R. and K. J. Harris (1997). “Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda.” *The American Journal of International Law* 90: 510-518.

⁴² Meron, T. (1994). “War Crimes in Yugoslavia and the Development of International Law.” *American Journal of International Law* 88(1): 78-87.

any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of states to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 [Article 28 (for Rwanda)] of the Statute.⁴³

The specific obligation to surrender fugitives is found in the articles 28 and 29 which read as follows:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - ...
 - d) the arrest or detention of persons
 - e) the surrender or the transfer of the accused to the International Tribunal.⁴⁴

The agreements to surrender suspects to the court are similar to bilateral extradition treaties, but they enable surrender in one direction only.⁴⁵ Because the Security Council has powers to act and to obligate states to act under the section of the charter relating to the maintenance of peace and security, this was a convenient and effective method of founding the court. The political will existed in the Security Council, and the legal powers were discovered with which to enact that will.

It is not obvious that the Security Council had the legal right to set up the tribunal under Chapter VII of the Charter. Neither is it clear that the Security Council could bestow upon the tribunal the authority to command states to co-operate since it was claiming to be independent even though its authority originated from the fact that it was a subsidiary body of the Security Council. The establishment of the tribunal has also been seen as the assertion of political supremacy of big powers over small states, since this

⁴³ Meron, T. (1994) p. 511

⁴⁴ Meron, T. (1994) p. 511

⁴⁵ Kushen (1997)

mechanism for setting up an *ad hoc* tribunal could only be used against less powerful states.⁴⁶ A subsidiary body could not have competence falling outside the competence of its principal, and it is questionable whether the General Assembly is competent to administer justice. The Security Council, it could be argued, is similarly incompetent to administer justice, but it is competent to handle matters relating to peace and security. Perhaps more importantly, the General Assembly is unable to make binding decisions, to make it mandatory for states to co-operate with the tribunal for example, whereas Article 24 (1) of the Security Council obliges all member states “to accept and carry out the decisions of the Security Council.”⁴⁷

These kinds of legal objections to the institution of the court have a similarity with some of the legalistic objections to the Nuremberg process. It seems clear enough, however, that it is not the cogency or correctness of any particular legal argument which carries the day. If there is a coincidence of political will between the great powers and others to set up an international military tribunal, or an international court, then they are able to discover legal mechanisms to do it. These courts are established by the powerful, with the authority of generally agreed principles of human rights. The ICTY was set up under a section of the UN charter which was clearly never intended to empower the Security Council to institute a court. Yet the Security Council discovered a mechanism for doing what it wanted to do. Perhaps the Nuremberg tribunal suffered from significant flaws; perhaps it was vulnerable to the *tu quoque* argument and perhaps also to the *retrospective justice* argument. However, after Nuremberg, the Nuremberg process itself

⁴⁶ Cotic, D. (1994). “Introduction.” *Criminal Law Forum* 5(2-3): 223.

⁴⁷ Kolodkin, R. A. (1994). “An Ad Hoc International Tribunal for the Prosecution of Serious Violations of International Humanitarian Law in the Former Yugoslavia.” *Criminal Law Forum* 5(2-3): 381, p. 388

constitutes a clear unambiguous precedent. Innovation is necessarily unprecedented. Similarly, the ICTY was perhaps created on the basis of a piece of legal trickery. But once created, it constitutes a precedent. Law is, as Rosalyn Higgins argues, the intersection of power and authority;⁴⁸ it is not simply a set of unchanging rules by which we are bound forever.

The structure of the tribunal consists of three principal organs: the Chambers, the Prosecutor, and the Registry. The Chambers are comprised of two three member Trial Chambers and a five member Appeals Chamber charged with adjudicating cases. The Prosecutor investigates allegations and prepares indictments for cases to be prosecuted. The Registry assists both the prosecutor and the Chambers, in addition to performing other administrative duties, such as requesting governments to provide information on the identity of the accused, to serve documents and to extradite the accused.

The tribunal retains concurrent jurisdiction with the national courts of states that have emerged from Yugoslavia since collapse. States have the right to put a suspect on trial for war crimes, but the tribunal has the power to re-try such a suspect.

Article 210 of the statute prohibits trials in absentia.

The tribunal's subject matter jurisdiction is established by the rules of international humanitarian law codified in

1. the Geneva Convention for the Amelioration of the Condition for the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention I),
2. the Hague Convention Respecting the Laws and Customs of War on Land,
3. the Convention on the Prevention and Punishment of the Crime of Genocide
4. the Charter of the International Military Tribunal.⁴⁹

⁴⁸ Higgins, R. (1999). *Problems and Process: International Law and How We Use It*. Oxford, Oxford University Press. p. 4.

⁴⁹ Note "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law." *Vanderbilt Journal of International Law* 28(45): 119-171.

The Secretary General's report declared that international humanitarian law as it "exists in the form of both conventional law and customary law" operates as the Tribunal's subject matter jurisdiction. Under the statute of the tribunal⁵⁰ "international humanitarian law" covers three specific areas: armed conflict, genocide and crimes against humanity. Articles 2-5 of the statute set forth the principal mandate of the tribunal, to criminalise ethnic cleansing. Article 2, entitled "Grave Breaches of the Geneva Conventions of 1949" embodies "the core of the customary law applicable in international armed conflicts." – thus a possible defence to charges involving the breach of the Geneva Convention is that the crime did not happen in an international conflict, but in civil war to which the Geneva Conventions do not apply.⁵¹

The ICTY is an empirical event; it exists. The court building is opposite the main conference centre on the edge of Den Haag, a couple of miles away from the seafront at Scheveningen. The brown stone 1950's style building is surrounded by a metal fence, behind which UN security staff can be seen patrolling from time to time. Their uniforms are reminiscent of American police uniforms, but UN pale blue; they carry guns on their belts. They are recruited from police forces and armies around the world, but are not working for those forces; they work for and owe their allegiance directly to the UN and to the court. I spoke to guards from Nigeria, Scotland, Italy and Venezuela. There is airport style security on entering the building. There are armed guards in the foyer and in the public galleries. They sit on either side of the defendants at all times behind the bullet-proof glass separating the court from the public.

⁵⁰ ICTY Statute <http://www.un.org/icty/basic.htm>

⁵¹ **Note** "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics and International Law." *Vanderbilt Journal of International Law* 28(45): 119-171.

The building feels like an international court. It flies blue UN flags outside; it has blue UN flags and insignia behind and above the judges. Daily, it proceeds with the business of conducting trials. It conducts slow and long trials, but trials nevertheless. Cosmopolitan criminal law is not some utopian concept; it exists in this building in the Hague, even if only in an embryonic form.

On a routine day in the court, when there is no verdict to be announced, no new indictment, nothing dramatic happening, there are not many visitors. There is a small press-room, a handful of journalists. There is a young man in the press room whose job it is to feed the television pictures of the trials onto the internet. Proceedings in each of the three courts can be watched, with a half hour delay, from anywhere in the world.

I arrived at the court shortly after the end of the Sawoniuk trial in London. There, I had become accustomed to gossiping about the progress of the case with the others in the public gallery in between sessions; there were the few who followed the case throughout; there were the ones who came to look, occasionally, or just for a day or two. On my first morning at the Hague, I was watching the Blaskic trial. During the break, I approached one of the few other observers. I asked how the trial was going, what were her impressions. She looked at me with disdain, and said, shortly, that she was not about to explain the whole complex case to me, and walked off. A while later, I approached three men who were there, and attempted, a little more subtly, to talk to them. They looked at me with suspicion. They asked me who I was, what I was doing there, and why they had seen me talking to a Croatian journalist. I suddenly became aware that the whole atmosphere at the Hague was different to that at the Old Bailey. The woman had been a Croatian, covering the trial of Blaskic for a Zagreb paper; the three men, I noticed

later, left the court-house every day in a large black BMW with Bosnian diplomatic number plates. The events dealt with here were so much more current and fresh than at the London trial. There was an atmosphere and suspicion. There were 'supporters' of all sides present; those who had direct experience of being 'cleansed' and those whose profession it was to deny and lie about ethnic cleansing. A small part of the war was still being fought, here, in the court building. The build up to the NATO bombing in Kosovo was happening at the time I was there.

The three Bosniac men told me that they were spies "like James Bond". They watched the trials, taking long and detailed notes. I spent some time trying to gain their confidence, hoping that perhaps I would be able to interview them. They became more friendly, and a little less suspicious, but they had their work to do; they answered questions either in riddles, or with the official Bosnian Government 'line'.

The staff who work in the building speak mainly English, as they sit in the space allocated in the foyer for smoking cigarettes, and drinking coke and coffee. I spoke to Americans, Canadians, British, Dutch, French, German, South African, and others. They are lawyers, ex-cops, translators, clerical workers, students doing internships. Being a sociologist, I attempted to strike up conversations with people, to find out what they had to say, to build up an impression of them and how they were thinking; to form an idea of the general morale of the staff and the institution: to do a little amateur ethno-methodology. I found them, in general rather tight lipped. It was only a few days later, when I was approached and questioned by the head of security at the court, that I realised that each member of staff who I tried to talk to, subsequently went to him to report the conversation. He knew my name, he knew who I had been talking to, how long I had

been around, and which trials I had been observing. All of this bolstered my impression of the seriousness of the court. They take themselves seriously and they take security seriously.

The UN existed in Srebrenica as it exists at the Hague, with the same blue flags and helmets; it had similar institutional forms and appearances. The content, however, of the supra-national interventions were significantly different. At the Hague, the UN institution is based on due process, justice, respect for human dignity and for human rights. It has a real if limited independence from the powers which set it up. It is self-consciously building on the fragments of cosmopolitan criminal law and practice which were bequeathed to it by previous processes. The ICTY quietly conducts its ground-breaking business. It contrasts starkly with UN negligence and indifference during the war in Bosnia. Even if the ICTY was set up by the Security Council in order to fail, the reality, in a limited way, is defying expectations. This UN institution has attained some real humanitarian content. What exists in the ICTY is a spark of genuine cosmopolitanism; in Srebrenica, behind the cosmopolitan façade there was only darkness.

Chapter 5

CASE STUDIES FROM THE ICTY; THE TRIALS AND TIHOMIR BLASKIC

In this chapter, I present two case studies of trials from the ICTY which I have observed and of which I have studied the transcripts. Blaskic presented himself as a professional soldier, and is the highest ranking person so far to have been convicted at the ICTY. Tadic, a Greater Serbian ideologue and torturer in a small town, was the first conviction at the ICTY.

a) The case of General Tihomir Blaskic¹

The trial of Tihomir Blaskic, a general in the Croatian army, opened on the 24th June 1997, ran until the 30th July 1999 and judgement was passed down on 3rd March 2000. He was, at the time of his conviction, the highest ranking person to be found guilty at the Hague and was sentenced to 45 years imprisonment. He was the first to be found guilty who had not committed violent acts with his own hands, but was held responsible for such acts due to his position in the military structure in the Croatian army in Bosnia. He was in his late thirties at the time of the trial.

He was charged with having committed, ordered, planned or otherwise aided and abetted in between 1st May 1992 and 31st January 1994:

- a crime against humanity, persecution (attacks upon cities, towns and villages; killing and causing serious injury; destruction and plunder of property; inhumane treatment of civilians; forcible transfer of civilians);
- crimes against humanity, willful killing and causing serious injury;

This account is based on my own observation of the case, on the live pictures from the ICTY available on domovina.net, and on the transcripts and judgement, available at the ICTY website, <http://www.un.org/icty/>

- grave breaches of the Geneva Conventions;
- and violations of the laws or customs of war, for killing, serious bodily harm, destruction and plunder of property, destruction of institutions dedicated to education or religion, inhuman or cruel treatment of detainees, including the taking of hostages for use as human shields, all this against the Muslim population of central Bosnia and in particular the Lasva Valley, that is more specifically in the municipalities of Vitez, Busovaca, Kiseljak and, to some degree, Zenica.

He was, in any case, charged with not having taken reasonable measures to prevent crimes or to punish the perpetrators thereof although knowing or having reasons to know that the crimes were about to be committed or had been committed.

He was found guilty on every count, except that he was not held responsible for the shelling of civilian homes in Zenica, though the trial chamber concluded that this crime was probably committed by his forces in the HVO.²

The Blaskic trial was held in a small court room, which appeared to have been constructed on the mezz floor of the building, on the landing of the large grand staircase. The glass which separates the court from the public does not seem so much to cut the court room in half but to give more of a zoo-like impression, as though the court was in a glass cage, and the public could come along and look whenever they liked. The public gallery feels as though it is outside the court. There are three sections of seats, for the public, for journalists, and for VIP's. The VIP section is in the middle, and at the front of this section, the chairs are particularly comfortable. The small electronic boxes into which you plug your headphones work very well; there are settings for French, English and BCS (Bosnian-Croatian-Serbian). The glass barrier is sound-proof, and one can only hear what is being said through the loud speakers, or through one's headphones. There are also two television screens either side of the glass partition, which constantly show

² The HVO was the army of Croats in Bosnia; the HV was the army of the Republic of Croatia.

proceedings. Every now and then, the court decides to go into private session; suddenly, the microphones and television screens are switched off, the blue blinds are lowered over the glass partition, and the public gallery is entirely excluded from proceedings.

Inside the courtroom, there is a real feeling that one is in the presence of a genuinely international court. The Judges are from France, Portugal, and Guyana. The team of prosecutors is led in cross-examination by Kehoe, a man with a New York accent who is reminiscent of a tough, streetwise, rather intimidating cop. The defence team is smaller, consisting of a Croatian and a young, American, who, in contrast, seems to be rather 'Ivy-league'. When the two Americans clash fiercely across the court room, the French Judge in the middle looks exasperated at this American adversarial combat, and yet again, but vainly, appeals for a little "synthesis" from all sides: "we don't want still to be here at Christmas".

The area in which Blaskic was responsible for ethnic cleansing was the Lasva Valley, 30 km north west of Sarajevo, surrounded by hills, through which the main road towards Travnik and Vitez passes. The municipalities, according to the 1991 census, of Vitez, Busovaca and Kiseljak, which are in the Lasva valley, had been roughly evenly divided between Croat and Muslim populations, with a small Croat majority.

In early 1992, Blaskic was in Vienna, having left the Yugoslav army (the JNA). In February 1992, the municipal council of Kiseljak, the town in which Blaskic had been born, invited him to organise the defence of the municipality against the Serbs. This was initially organised with both Croat and Muslim participation. On the 6th April 1992 the Republic of Bosnia-Herzegovina declared its independence, and was formally recognised by Croatia the next day. The UN Security Council called for external forces to leave the

territory of Bosnia. They demanded that the JNA and Croatian army units withdraw, place themselves under the authority of the Bosnian government, or be disbanded. But the now Serbian JNA was nearby, at Jajce, and was also advancing towards the Lasva Valley from the South East. The Croatian nationalists, with the backing of Zagreb, gained the leadership of the HVO, the Croatian Defence Council in Bosnia, against the wishes of those Croats who supported multi-ethnicity or cohabitation with the Muslims. The Bosnian Territorial Defence (the TO) was formed on 9th April 1992 and the next day was 'outlawed' by the 'President' of the Croatian community in Bosnia, Mate Boban. The Croatian General Anto Roso confirmed this in an order on the 8th May and on the 11th May and Tihomir Blaskic implemented that order by pronouncing the TO unlawful in the territory of Kiseljak. The joint Muslim and Croatian defence of the Lasva valley, therefore, was only ever notional, and was quickly replaced by a Croatian nationalist leadership, who planned a campaign of ethnic cleansing against the Muslims in the area. They were not prepared to allow Muslims to participate in the defence against the Serbs, since it would have been necessary to allow them access to weapons.

Blaskic's defence contained a number of strands, but centrally, he argued that he was in charge of a poorly trained, hurriedly mustered force; he was under siege from the Serbs, communications between himself and his forces were difficult, and there were many Croatian paramilitary and police outfits operating in the area over which he had no authority. There were atrocities committed, of which he did not approve and over which he had no control. He further argued that some of the atrocities committed against Muslims were in fact either committed by Serbs or by Muslims themselves. He argued that Muslims were committing atrocities against Croats, and that it was not surprising if

Croat forces which he was unable to control retaliated in a similar manner. His defence argued that he had repeatedly issued written orders that his forces should respect humanitarian law. And the defence maintained that the use of work-teams made up of prisoners to dig trenches was legal at the time of the conflict.

Blaskic presented himself in court as an experienced and meticulous army officer. He was always courteous. He played the part of an isolated professional soldier trying valiantly but unsuccessfully to discipline his untrained civilians into a modern and professional army. During his cross examination, Kehoe would always greet him with gruff a “Good morning General”. Blaskic would answer “Good morning Mr. Prosecutor”. And they would get down to business. Kehoe would introduce a document, maybe a copy of an order which Blaskic had received or issued. Blaskic would require ten minutes to read the order. Kehoe would ask him what the order meant. Blaskic would take five minutes to explain in great detail the meaning of the order, explaining everything in it except for that part which was relevant. It became increasingly clear under cross examination that his professional attention to detail and rules was a screen behind which Blaskic was hiding the reality of his job in the Lasva Valley. He had a legalistic, unrealistic and pedantic way of reading documents, and attempted to use this as a shield against the accusations. He attempted to drown the court in detail. This cross-examination went on for six weeks.

In May 1992, tensions between Muslim and Croatian populations intensified in the Lasva Valley. The Croatian flag was being flown on public buildings which the HVO controlled; mosques and Muslim houses were beginning to be attacked and there were some ethnically motivated murders. Some officers of Croatian origin were kidnapped by

Muslims. Muslims were beginning to be pushed out of their homes by Croats and there were many Muslim and some Croatian refugees moving into the area from places where they had been pushed out by Serbs.

Blaskic was appointed commander of the Central Bosnian Operative Zone of the HVO on the 27th June 1992.

The Vance-Owen plan was put forward on the 2nd January 1993. It proposed the creation of ten provinces in Bosnia, which would each have substantial autonomy. The Lasva valley was largely located in province 10 and the rest in province 7. Though the Vance-Owen plan was never implemented on the ground, the tribunal judged that the Bosnian Croats understood that province 10 was to be given to them, and they also understood that they would have an interest in incorporating the Croatian areas of Province 7, which was predominately Muslim. "...[T]he Bosnian Croats," argued the judgement, "bore a heavy responsibility in conducting the war in anticipation of its [the Vance-Owen plan] implementation and in willing its unilateral execution"³

Mate Boban ordered Muslims to hand over their arms by the 15th January 1993 and the HVO proceeded with a campaign to 'Croatise' the territories by force. Hundreds of Muslims were arrested and many were imprisoned in Kaonik, where they were badly treated. These Muslim prisoners were used to dig trenches, often under inhuman conditions and exposed to enemy fire, and were also used as human shields.

In April 1993, at a televised public meeting, Blaskic said that HVO soldiers had been attacked in Nadioci and in a written order, he commanded the HVO brigades and the Bitezovi special unit to fire back if attacked; he ordered the HVO brigades and the Military Police 4th battalion to defend themselves against "Muslim terrorist attacks". On

the 16th April 1993 at 0130 hours, he issued a “combat order” to the Vitez Brigade and the Tvrtko independent units to “prevent the attacks of extremist Muslim forces”. They had to be ready to commence shooting at 0530 hours on the 16th April. These statements and orders were thinly encoded plans to begin the campaign of ethnic cleansing in earnest. At that time, and over the following days, the campaign was carried out in the Lasva Valley. Civilians were killed and wounded, houses burnt down, minarets brought down, mosques destroyed, women and children separated from the men and left to flee; women were raped and men imprisoned, beaten and led off to the front to dig trenches.

Ahmici was a largely Muslim village and was well known for its practice and teaching of the Muslim religion; its largest mosque had just been re-built. The Croatian inhabitants left the village on the evening of the 15th April. At 0530 hours on the 16th April, artillery began to bombard the village. Many Muslims, men, women and children were forced out of their homes and shot, many others were burnt alive in their houses. This was the village where the British UN peacekeepers led by Colonel Bob Stewart, who gave evidence at the trial, found the bodies of many people. Stewart was interviewed at the time by television news. His anger, disgust and frustration at the scene his men had found in Ahmici penetrated his English and military reserve. The interview was moving and memorable. No soldier in the HVO, the military or paramilitary police units, was ever punished for the events at Ahmici by the Croatian authorities. This reaction can be contrasted with the fact that on the 16th April, the very day of the attack on Ahmici, Blaskic sent a protest to UNPROFOR because a United Nations armoured vehicle had knocked down the fence of a church.

3Jorda, *Judgement*, <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>

Many other villages in the Lasva Valley met the same fate on the 16th April and the following few days, though, inhabitants were also taken prisoner or forced to flee, as well as being murdered. There were attacks on Muslims all through the Spring and Summer of 1993, which constituted the campaign to Croatise the territory.

Judge Jorda said in his judgement that

The accused ordered that attacks be launched which resulted in crimes being committed for which he is responsible or in any case aided or facilitated their commission and, moreover, did not take the reasonable measures which would have allowed the crimes to be prevented from being committed or the perpetrators thereof to be punished.⁴

The prosecution refuted Blaskic's most important defence, which was that he had difficulty in communicating with his troops⁵ and that the crimes were committed by paramilitary units that were not under his control. The judges found that Blaskic had been successful in setting up a solid chain of command throughout the territories for which he was responsible. That chain of command incorporated paramilitary and police outfits which were not part of the HVO but which were shown during the trial to have operated under the authority and direction of Blaskic.

The HVO was not simply an army, but also had a civilian structure. The distinction between the military leadership and the civilian or political leadership was not sharp. Blaskic often appeared in public meetings, alongside Mate Boban, Dario Kordic⁶, Anto Valenta and other political leaders, who sometimes wore military uniforms; he was

⁴ Jorda, *Judgement*, <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm>, p. 8

⁵ In fact, it was shown that cellular phones were working in the area at the time.

⁶ At the time of the cross-examination of Blaskic, the trial of Kordic was beginning in the courtroom upstairs. Kordic, the political leader of the Croats in the Lasva Valley at the time was found guilty on the 26th February 2001 for his part in the ethnic cleansing of the territory, and particularly for ordering the attack on Ahmici and other villages in April 1993. He was not found to be a prime mover or an architect of the overall campaign, but was found to be an important politician in the Valley. At the time of his conviction, Kordic was the most senior political leader to have been

part of the leadership of the HVO, and was clearly aware of the fact that the programme of the HVO was one of 'Croatisation' and ethnic cleansing of Muslim people, places of worship and businesses.

Much time was spent during the trial by the prosecution to show that the conflict was an international conflict, and not simply a conflict between Croats and Muslims within Bosnia. This was relevant for two reasons. Firstly, some of the laws and customs of war, particularly the Geneva Conventions, only apply to international conflict, so that it was necessary to prove the existence of an international conflict in order to convict Blaskic of breaking those laws. Secondly, it was shown during the trial that the HVO and Blaskic were carrying out the policy of the Republic of Croatia, in working towards the 'dream' of a Greater Croatia. Franjo Tudjman had met with Slobodan Milosevic in March 1991 to discuss the sharing of Bosnia between themselves. The chain of command was shown, in the trial, not only to be strong from Blaskic downwards to the troops on the ground carrying out the ethnic cleansing, but also upwards, all the way to Tudjman. A fiction of HVO independence from Croatia was maintained, but it did not constitute a reality. Many HV⁷ personnel operated within the HVO, and documents produced during the trial show that they were ordered to change their insignia to those of the HVO. Later, Blaskic himself was transferred from the HVO to the HV on the orders of President Tudjman.

It is true that Croatia, initially at least, gave some aid to Bosnia, but its links with the HVO were much closer, involved the interchanging of personnel and the donation of

found guilty at the ICTY. Press Release summarizing the judgement in the Kordic case, 26 Feb 2001, <http://www.un.org/icty/pressreal/p567-e.htm>

7

Croatian Army

a million Deutschmarks a day. Fundamentally, the Republic of Croatia was involved in a cross border military campaign with the eventual aim of annexing parts of Bosnia.

The trial of Blaskic took over two years, heard 158 witnesses and received nearly 1500 exhibits. It is perhaps a measure of the novelty and immaturity of the system of international criminal law that this trial, which was not fundamentally very complex, took so much time, money and resources. It is possible that with increasing self-confidence, and experience, the ICTY will be able to try cases more quickly and efficiently. William Clegg, the barrister who defended Tadic at his appeal, and also Sawoniuk, expressed the opinion in an interview which he gave me⁸ that it should be possible to try a case such as this in six weeks. He argued that it would be better for the prosecution to pick its five or six clearest incidents with which to prove its charges, instead of attempting to prove every single allegation. It is also true that these first few trials have been concerned to prove larger issues than the guilt or innocence of the accused. For example, in the Blaskic and Tadic trials, much time was spent proving the complicity of Croatia and Serbia in the conflict in Bosnia and proving that genocide and crimes against humanity were being committed. Such issues, it is to be hoped, need only to be proven comprehensively once.

⁸

Interview conducted in The Hague, 21 April 1999.

b) The case of Dusko Tadic⁹

Dusko Tadic was the first person ever to be convicted by a genuinely international court of crimes against humanity and genocide. He was found guilty in May 1997 by the tribunal at the Hague and sentenced to 20 years imprisonment.

Tadic was arrested in February 1994 in Germany, where he was then living, on suspicion of having committed offences at Omarska, including torture and aiding and abetting the commission of genocide, which constitute crimes under German law.

Proceedings at the ICTY against Tadic started on 12th October 1994 when Goldstone, the court's first prosecutor, filed an application that the Federal Republic of Germany should hand over Tadic to the Hague, and for the German courts to defer competence to the international tribunal. A public hearing was held on 8th November 1994 after which the indictment of Tadic and an arrest warrant was produced in February 1995.

Tadic was charged with individual counts of persecution, inhuman treatment, cruel treatment, rape, willful killing, murder, torture, willfully causing great suffering or serious injury to body and health, and inhumane acts alleged to have been committed at the Omarska, Keraterm and Trnopolje camps and at other locations in Opstina Prijedor in the Republic of Bosnia and Herzegovina.

Germany enacted the necessary legislation for his surrender and he was transferred to The Hague on the 24th April 1995. He pleaded not guilty to all charges.

⁹ This account is based on my own observation of the case, on the live television pictures available on domovina.net and on the transcripts and judgement, available at the ICTY website, <http://www.un.org/icty/>

Following many pre-trial hearings about rules, procedure, and other technical matters, the trial of Dusko Tadic began on the 7th May 1996.

Mira Tadic gave evidence to the tribunal. She had married Dusko in 1979, after living with him for a year. At the time that she gave evidence she was 35. She was a nurse; Dusko only had secondary school type qualifications. Between 1980 and 1986 Tadic worked in a factory, assembling electrical equipment. In 1986, Mira got a job as a nurse in Libya and Dusko went with her. They were divorced in 1987 because, she explained, she wanted to get work in Switzerland as a nurse, and it was easier for single people to get such work than for married people. While they continued to live together, however, she never got the job in Switzerland. In 1987 Tadic formed a construction company, and it got some work in Croatia, but the business ended in summer 1989. Next, Tadic spent time working on his own house, and also some periods in Germany, working for his brother's construction company in Munich. Tadic opened his café in early 1991. Mira told of a letter that they received from Muslims which "was threatening, saying that we should leave Kozarac and if we do not leave Kozarac within three months that we would be killed, and it was signed by the 'Young Muslims from Kozarac', that is the party of SDA -- the SDA party." On two occasions the shop window was broken and at one time the café was broken into and burgled. Mira Tadic gave evidence as follows:

Q. As we enter 1992 and some five months before the conflict in Kozarac, what was the state of relations like in the town amongst the different ethnic groups?

A. The relations were tense. Apparently, we would say 'hello' and talk, but there were no close contacts or visits. Everybody was just minding their own business.

Q. What was causing this tension?

A. Because people were simply afraid of one another.

Q. Were you or your husband adding to this tension? Were you or your husband adding to this climate?

A. We could not add to it because we were a minority. We were more or less the only ones there.

Q. Why did you leave on 1st April 1992?

A. Because at that time in Kozarac it was not safe any more. We were in a minority. The Muslim people became organised. They had their barracks, they wore uniforms, held arms. I was afraid for my life and for the life of my children, and that is why I left Kozarac.

The presentation of the prosecution case lasted for 47 sitting days and ended on 15th August 1996. During this period 76 witnesses gave evidence and 346 prosecution exhibits were admitted including video tapes of the region and a model of the Omarska camp, together with a further 40 exhibits from the defence. The defence case began on the 10th September 1996, ending on the 30th October. Forty witnesses were presented and 75 exhibits admitted. Tadic testified for 3 days from the 25th October 1996.

The judgement produced by the tribunal in the case of Tadic was about 120,000 words long. It is a comprehensive account of the trial and of the events for which he was on trial. It spends many pages giving an outline of the history of Yugoslavia and its political break up, focusing on the growth of the idea of the Greater Serbia and the development of ethnic cleansing as an instrument of national policy. It is a self-conscious attempt to provide an objective, authoritative and impartial narrative concerning the break-up of Yugoslavia, ethnic cleansing in Bosnia and of the small part played by Dusko Tadic.

. Tadic was born on 1st October 1955. His mother had been deported during the second world war to Jasenovac, the notorious concentration camp run by Croat Ustasa forces in alliance with the Nazi regime. This son of a concentration camp survivor was to become a genocidaire and torturer himself. He comes from a prominent Serb family in

the small town of Kozarac. His father was a decorated world war two hero. Tadic taught karate and was the father of two daughters. 90% of the inhabitants of Kozarac were Muslims prior to the conflict. Tadic testified that most of his friends had been Muslim.

He joined the SDS, the Bosnian Serb political party, in 1990. A witness testified that the café which Tadic owned and ran became a centre for Serb nationalists, who gathered there, singing Chetnik songs and developing anti Muslim racist behaviour. Tadic's brother's ex-wife testified that Tadic admired Milosevic, and that he had said that if his next child was a boy, then he would call him Slobodan. After the ethnic cleansing of Kozarac had been accomplished, Tadic became the political leader of Kozarac, was elected president of the local board of the SDF and was appointed as acting secretary of the local commune in September 1992, also becoming its representative to the Prijedor Municipal Assembly.

Tadic began service as a reserve traffic police officer at the Orlovci checkpoint on the 16th June 1992, and was thereafter assigned duties as a reserve policeman in Prijedor. He went to some lengths to resist being drafted for military service, and when after more than one attempt, he was successfully drafted to the war zone, he escaped the following day and then went into hiding. He was arrested several times during the ensuing months for desertion but always managed to escape.

In August 1993 Tadic travelled to Nuremberg, then to Munich, where he stayed with his brother, who operated a club there. He was re-united with his wife, and was arrested by German police on 12th February 1994.

One of the central charges against Tadic was that he was involved in killing, sexual torture and rape at Omarska. The incidents of sexual torture, as described in the

previous chapter of this thesis from the account of Rezak Hukanovic, were widely reported; in the whole trading of atrocity stories which surrounded the conflict in Bosnia, the story of one prisoner being forced to bite off the testicle of another attained a certain centrality. The tribunal found that the beatings of the five named prisoners and of Senad Muslimovic did take place in the hanger at Omarska and that witnesses G, and H at the trial, whose identities were protected, had been compelled to and did take part in the sexual assault on Fikret Harambasic, and that G was compelled sexually to mutilate him by biting off one of his testicles. These events took place on the 18th June 1992. The judgement describes the assaults and the beatings in detail, relying on a large body of witness testimony.

Tadic was identified by the witnesses as being involved in the beatings. One witness knew Tadic before they met in Omarska, and also identified him in court. Another witness had previously identified him from a 'photospread' procedure, which identification was accepted by the tribunal. Witness Senad Muslimovic said that Tadic was among those kicking him severely when he was tied to a large tyre, and that Tadic threatened his eyes with a knife, threatened to cut his throat and to cut off his ear, and he testified that Tadic in fact stabbed him twice in the shoulder. Tadic was seen by nine witnesses on the day of 18 June, calling prisoners out, beating prisoners, torturing prisoners. The judgement gives details of this testimony, with names of witnesses and victims.

Tadic's defence in relation to these allegations on the 18th June is that he was not present at Omarska. He says he never visited Omarska, and that on that day he was working as a traffic policeman. The judges were satisfied that Tadic took part in the

beatings, and that he was present, but was not necessarily a participant in the sexual mutilation.

Hase Icic testified in great detail to events at Omarska on the 7th and 8th July 1992. He had known Tadic at school, and had also played football with Tadic's brother. He testified that Tadic was present when he was taken into a room, a noose was tightened around his neck, and he was beaten unconscious with iron bars, whips made out of heavy electric cable and other weapons. The trial chamber accepted Icic's evidence.

Sefik Sivac testified that he had once been good friends with Tadic until there was an incident when he had thrown Tadic out of his café. He threw him out because he had been saying that there "would be a Greater Serbia, it would be theirs and that we, Muslims, will not be there, that there will be no place for them".

Sometimes the judgement describes conflicts of evidence, places where the evidence of different witnesses were incompatible. The judgement details the conflicts and states clearly which version the judges believed, if any, giving reasons for the preference, and giving the logical process by which the tribunal reached its conclusions.

The judgement details each incident described by the witnesses, the alleged role of the defendant, the defence argument, and then its conclusions as to fact. Elvir Grozdanic testified that he had known Tadic for ten years before the war, and that he had taken weekly karate lessons from him. He told of many abuses in Omarska, including Muslims being forced to chew grass and "grunt as pigs do" and also to drink water from the ground "as dogs do". He told that he had seen a prisoner pushing an apparently lifeless body in a wheelbarrow, and that he had seen Tadic insert the hose from a fire extinguisher into the mouth of the body.

The defence evidence once again, consists of Tadic's alibi that he was on duty as a traffic policeman and his claim that he had never visited Omarska. The defence produced witnesses to say he had often been seen at the checkpoint, that his superior officer had often checked to make sure he was on duty, and they testified that Tadic did not have the right to use the police car for his own purposes and so couldn't have travelled to Omarska. They also argued that since it is not known whether the person in the wheelbarrow was alive or dead, then it was not necessarily an offence to insert a fire extinguisher hose into its mouth. A number of witnesses also testified that they had seen Tadic at the Trnopolje camp. Tadic admits having visited Trnopolje on five occasions for innocent reasons, usually accompanying Red Cross visitors.

The judgement discusses in some detail the charge that the motivation for the behaviour of the accused was discrimination on the grounds of race and of politics, and was part of a plan to build a Greater Serbia without a significant Muslim population. Tadic had been one of the early members of the SDS, whose policy it was to cleanse the Republica Srpska. He was a supporter of the policy of ethnic cleansing and understood it fully. Acceptance of this policy, and the discriminatory means to achieve it, was considered to be a requirement for advancement in the SDS. There was much evidence given about Tadic's personal commitment to the project of the Republica Srpska and also about his own increasing nationalist sentiment and his anti-Muslim racism.

The next charge related to the selection of five named Muslims from a forced march on 27th May 1992. The first witness described the selection of two of his brothers, his son and two others, who were held near a kiosk. The second witness testified that some minutes later he saw the five men being held at gunpoint near the kiosk. The third

witness passed the kiosk a couple of hours later. He recognised four of the five men, and said that another was taken from his column. When he was about five metres away from the men, he heard two bursts of loud 'fire' and he saw the men falling, one stayed standing for a few moments before he fell. All three witnesses testified that Tadic was the one making the decisions about who to select from the column, and the last witness testified that it was Tadic who gave the order to kill them.

Witness U for the defence testified that he was marching with the column, but that he didn't see Tadic at all during that day. It came out under cross-examination, however, that U now lives in a house that belonged to a Muslim, and it was assigned to him by a Serbian committee on which Tadic used to sit. Witness W also testified that he had not seen Tadic at all during that day, however, two prosecution witnesses testified that they had seen witness W at the Keraterm camp, calling people out for torture. Witnesses V and A, also friends of Tadic, testified that they had not seen him in the town during that day. V and W, however, did confirm that Muslims were killed that day who were taken out of the marching column.

Due to some crucial inconsistencies in the prosecution evidence relating to this incident, the trial chamber did not find Tadic guilty of selecting and killing these men, though they are sure that Tadic was on the scene and that men were selected and killed.

The next charge related to events in the villages of Jaskici and Sivci on the 14th June 1992. Armed Serbs, including Tadic, are accused of going from house to house in these villages and calling out residents, separating men from women and children and killing a number of named men. The population of these two villages had already been

swelled by the arrival of a number of Muslim refugees from Kozarac, which had previously been attacked by Serb forces.

In Sivci, 350 men were taken out of their houses after the village was shelled by Serb tanks. They were made to run to a collecting point, and at intervals were ordered to lie down in the road, where they were kicked and beaten by armed Serbs. Their money and identity papers were stolen as they were tortured. At the collecting point some were beaten again, and they were put onto buses and taken away to the Keraterm camp.

The experience of the smaller village of Jaskici was similar. All the men were marched away, and after they had left, the women of the village found that the bodies of five of the men had been left behind. Many of the women then left, but some remained, and witnessed the repeated return of the Serb men, who stole everything from the houses, from tractors to liquor. Two of the older men who had been left behind attempted to bury the bodies of the five men but were obstructed by the Serbs, and were eventually obliged to bury them in one single grave. Subsequently all the houses of Jaskici were burnt leaving only ruins.

There were five witnesses, four of whom already knew Tadic, who saw him in Sivci or Jaskici on the 14th of June in spite of the fact that he claims not to have left Banja Luca. The tribunal was satisfied that Tadic was amongst the armed men who entered these two villages. One witness, who had known Tadic, described him beating men from the village with a stick, and pouring water over those who had fainted to revive them. She also described Tadic beating her father. She has never seen the men of her family since that day, although she has made efforts to trace them. This witness' sister described Tadic beating men with a rifle butt. Both witnesses independently described Tadic as

having a beard and wearing a camouflage uniform. The other witnesses identified Tadic, and described him taking part in classical ethnic cleansing behaviour, beating, threatening, terrorising people out of their houses.

Though there were some inconsistencies in the detail of the evidence, for example, in their descriptions of the Tadic's uniform, and of the uniforms of the other armed men with him, the tribunal was satisfied that Tadic had been an active participant in the ethnic cleansing of the two villages, but the tribunal was not satisfied that the five men had been murdered by Tadic or the armed men with him.

The next incident that Tadic was alleged to have been involved in was the attack on Kozarac and the surrounding hamlets on the 24th to 27th May 1992. Witness Q worked at the hospital in Kozarac. On the way home from the hospital on the 24 May, he saw Tadic with another man jumping over a fence into some gardens. Moments later, he saw a flare being launched from the vicinity of the gardens which illuminated the hospital so that the Serbian artillery and tanks could shell it and seriously damage it. The defence showed that witness Q had previously given a different sequence of events in his witness statement, that he had said that he was on the way to the hospital, not on the way home. He explained the discrepancy by saying that he had not thought the details were important when he gave his statement and that the account he now gave in the tribunal was full and authoritative. The tribunal accepted Q as a reliable witness. Other witnesses testified that they had seen Tadic in Kozarac during the time of the attack, and participating in the attack. One witness testified that Tadic had said to him that Kozarac was going to be part of a Greater Serbia and saying that he had "liberated Kozarac and nobody is going to take anything out of Kozarac, only over my dead body".

The judgement discusses a number of issues regarding the nature of the evidence at the tribunal, and possible problems with it. This was the first case before the ICTY. The rules of evidence and of procedure were being developed by the tribunal and the appeals chamber during this and following cases aiming to draw on 'best practice' from the world's legal systems.

The first problem discussed concerned difficulties regarding access to evidence. Both parties encountered problems due mainly to the fact that the authorities in the Republica Srpska were unwilling to co-operate with the tribunal. Most prosecution witnesses were living in western Europe, whereas most defence witnesses were resident in the Republica Srpska. In the trial use was made of video conferencing to link the court room with the Republica Srpska. Some witnesses were guaranteed anonymity and others were guaranteed immunity from arrest while travelling to and from the court.

The second concerned the lack of specificity of the charges, particularly in terms of time. Some counts allege crimes to have been committed "on or about" a particular date. This makes it difficult for the defence to establish alibi but is, in many jurisdictions, usual practice in criminal trials.

Thirdly, the tribunal discussed the need for corroboration. The defence argued that the court should not be able to convict when the only evidence is one uncorroborated witness (*unus testis, nullus testis* – One witness is no witness). The tribunal rejected this principle, arguing that it is established practice in many jurisdictions that a court may convict on the evidence of one witness alone.

Fourth, that most of the witnesses for the prosecution were also victims of the conflict and the defence argued that witnesses were likely to be less reliable if they were also

from the ethnic group which had been victimised. Similarly, most defence witnesses were Serbs, which may also be thought to effect their credibility. The tribunal's answer to this point is that the credibility of each witness should be judged independently, after having seen their testimony and their cross-examination.

The fifth problem was pre-trial media coverage and the infection of testimony. The tribunal admitted that this could be a problem and said that they took this issue into account when deciding on the credibility of witnesses, when the issue of media coverage had been raised in cross-examination.

The sixth was the issue of identification evidence. Identification was crucial in this case because Tadic's alibi held that he was never present at the camps and the scenes of crimes. The tribunal was able to rely upon identification evidence of those who had known Tadic since childhood, and who therefore were able to identify him more certainly. They also relied upon four witnesses who identified Tadic from a series of photographs of men.

The seventh problem relating to the types of evidence available to the international court was exemplified by testimony of Dragan Opacic. This incident, was dramatic. Opacic was an important witness, and he made many allegations against Tadic. One allegation, was that he swore that he had been present when Tadic has murdered his father.

'But isn't your father still alive?' the defence asked on day three. Opacic insisted that he had watched him die. 'But this man is your father,' said the cross-examiner, calling to court an old man who rushed to embrace the witness.¹⁰

The prosecution withdrew all reliance on him. Opacic's identity had been protected, and he had been known only as witness L. The defence had managed to identify him, in spite

of his anonymity, and only because of this identification, had been able to show him to be a liar. The defence argued that many witnesses were not investigated in the way that Opacic was, and that others may be equally unreliable. The tribunal argue that Opacic was the only witness who was discovered by the Bosnian authorities while he was in custody. No other witnesses shared the same provenance and so Opacic could be treated as an individual case. But the general possibility of problems is well illustrated, with allowing anonymity to witnesses and with receiving witnesses from the custody of states hostile to defendants.

The eighth problem discussed was the issue of hearsay. It was decided not to make the admission of hearsay evidence inadmissible, but to allow the tribunal to hear the evidence and give it the weight that they judged it deserved. This kind of flexibility is facilitated by the fact that there is no jury, but it requires good judges.

All of these problems are considerable, although some are often present in ordinary criminal trials. None, however, are sufficiently serious to make fair trials impossible. It is clear, however, that thoughtful, impartial and aware judges are necessary to take into account and judge the proper weight to be given to different kinds of problematic evidence.

Much time in the Tadic case, as well as the Blaskic case was spent in showing the existence of an international armed conflict. The court found that

at all times relevant to this case there was both an armed conflict between Bosnia and the Republica Srpska and also that this constituted an international armed conflict, since the Republica Srpska was backed by Yugoslavia and the VJ, the army of the Republica Srpska, was closely connected to the JNA, and was aided by the JNA.¹¹

¹⁰ Robertson, G. (1999). *Crimes against Humanity*. London, Penguin, p. 292

¹¹ Judgement, Tadic case, the ICTY website, <http://www.un.org/icty/>

However the trial chamber held, by majority, that it could not be shown that there was an international armed conflict taking place in Bosnia after 19 May 1992. There were 11 counts which relied on the fact that they constituted ‘grave breaches of the Geneva Conventions’ and since the tribunal held that there was no international armed conflict existing after that date, Tadic was found innocent of these 11 counts.

It was also necessary for the prosecution to establish a link between the actions of the accused and the wider armed conflict, since international humanitarian law has no jurisdiction over crimes which are not thus linked. Tadic’s actions in Kozarac, Sivci and Jaskici are clearly linked to the overall campaign of ethnic cleansing being carried out by the Serb forces in Bosnia. His acts in the camps established by the Republica Srpska were also clearly carried out with the connivance or permission of the authorities, so here, also, his crimes are directly connected to the armed conflict.

Article 5 of the Statute concerns crimes against humanity, proscribed by customary international humanitarian law. The tribunal held that, since the Nuremberg charter, the customary status of the prohibition against crimes against humanity and the attribution of individual criminal responsibility for their commission have not been seriously questioned. The tribunal argued that this finding is implicit in the appeals chamber decision which found that “[i]t is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict”

c) Towards an International Criminal Court?

Cynicism and naivety are both tempting. The small unpublicised court in the Hague contrasts starkly with the oceans of terror and misery caused by the events in the former Yugoslavia. So far, the ICTY has failed to hold any of the big criminals from the former Yugoslavia to account. Mladic, the man who personally organised the cleansing of Srebrenica and the rest of Bosnia and Karadzic, the mad psychiatrist who was the political leader of the racist campaign against Muslims still enjoy their freedom. Milosevic, the big boss, who gave a million Kosovars hours to leave their country is in a Yugoslavian prison, but has not been extradited to the Hague. Tudjman, the architect of the campaign of 'Croatisation' in Bosnia and the Krajina died peacefully in his bed. The court in the Hague was set up as a sop from the 'ethical imperialists'¹², who fought for hegemony in the Balkans under the cover of the language of human rights. It was set up spuriously by the great powers in the security council under the law authorising them to take measures to protect world peace and security. The court is bureaucratic and slow. The system gives great power to a politically motivated set of judges, who are allowed base their decision on many kinds of evidence which would usually be deemed by a national criminal court to be inadmissible including hearsay, contaminated identifications and anonymous witnesses.

Alternatively, it is possible to see the ICTY as a step in an inevitable process toward international order and human rights. The story of human rights is one of constant progress, banishing the darkness of inhumanity from the bright new modern

¹² Coates, K., Ed. (1999). *Ethical Imperialism: The war after the war*. The Spokesman. Nottingham, Bertrand Russel Peace Foundation.

cosmopolitan civilisation. The law has been written: it is in place. Finally, the world is in a position to deal with those who seek to deny others the status of human being.

The evidence from the Hague does not really show either of these views to be true; or perhaps, it shows them both to be true. The most important thing about the court is that it exists as an empirical event. Cosmopolitan law cannot any longer be regarded as some sort of utopian dream. It demands to be recognised as a reality. It has demonstrated that it is possible for an international court to hold trials under the universal jurisdiction of international criminal law. There is something enduring in this demonstration. We know that people can walk on the moon; we know that an international criminal court is a possibility. Once these things are demonstrated to be possible, they are possible forever.

It is true that the infamous names of the Yugoslavian wars have not been put on trial but it is not true that the court has had no effect on the lives and status of those people nor that it has had no influence over events in the Balkans. Tudjman's successors in Croatia have, grudgingly, accepted the jurisdiction of the court, and its legitimacy. Mladic and Karadzic had no place at the negotiations at Dayton, and were subsequently removed from power in the Republica Srpska. Karadzic's successor, Plaskic, now lives in a cell in the Hague as she awaits her trial. Milosevic has been deposed and arrested. The fact that Milosevic was indicted as a criminal must have been a significant boost to those fighting to depose him. Even if the Serbian opposition was more interested in his crimes against Serbs than his crimes against humanity, it must have helped that he was officially accused by the international community of being a criminal. It is not nothing that these people cannot travel abroad; they cannot make a nice living on the lecture

circuit, nor can they come to Harley Street for medical attention in their old age. It is not nothing to be indicted as a war criminal.

What of the charges against the court related to its flawed predecessor, the Nuremberg tribunal? What is to be said about the tribunal's foundation in a legal trick by the Security Council? What can we say about its own efficiency or fairness as a court? These problems bring us back to the central point; that of its existence. The court has a clear set of rules which it enforces. The provenance of its existence and its rules may be questionable, though there are possible answers to those questions but its existence is no longer in doubt; neither are the central precedents of Nuremberg, any longer, in doubt. Individuals are responsible for their crimes, even if obeying orders, even if committed as head of state. Crimes against humanity and genocide are criminal offences, which may be tried under universal jurisdiction. No principles in law are clearer, now, than these, even if they were open to dispute in 1945.

There are some questions which may be asked about the fairness of the court. For example, Robertson is worried about the lack of a clear demonstrable physical and political separation between the prosecution and the judges.¹³ We may also cite the incident of Dragan Opacic when he gave anonymous and false evidence which was only discovered at the last minute. As Caroline Buisman argues, the inequality of resources available to the defence and the prosecution and the liberal rules of evidence which are self-policed by the judges are also possible sources of problems.¹⁴ It is one central empirical finding of this thesis, however, that the trials that I have observed and studied have been, in my judgement, relatively fair trials; that is to say, they have been unfair

¹³ Robertson (1999).

¹⁴ Buisman, C. (2001) 'Self-governed international criminal tribunals: are they in need of a

only to the extent that ordinary criminal trials may be judged unfair. There is a clear body of law and rules upon which the ICTY operates; there is the opportunity for defendants to conduct a defence; there are opportunities to appeal against decisions made by the judges to a separate appeals chamber; there is due process; there are opportunities to cross examine witnesses, there are honest and competent judges. Of course the fact that trials are fair and that cosmopolitan law is clear does not tell us that there is a settled and just system of cosmopolitan criminal law in place. But it does tell us that cosmopolitan criminal law is possible and that it is not simply utopian.

CHAPTER 6

THE TRIAL OF ANDREI SAWONIUK: A COSMOPOLITAN TRIAL UNDER NATIONAL LAW¹

In chapters six and seven I look at two court cases which took place at the very end of the twentieth century. Both cases were concerned with one of its defining events, the Holocaust. One was the trial of Andrei Sawoniuk, a man who had been involved in carrying out the genocide in a small town in Belarus. The other was a libel trial, in which David Irving, a British neo-Nazi historian sued Deborah Lipstadt for calling him a neo-Nazi and a Holocaust denier. Both cases were looking back at the event from the distance of more than half a century. Both courts, therefore, found themselves writing the history of the Holocaust as well as judging more specific issues. Both were judging men who had chosen to allow the genocide to define who they were, who had been seduced by the glory and power of the Nazis, yet who were not exactly Nazis themselves. Both trials were in Britain, perhaps the country in Europe which had been least touched by the events themselves.

A central task of both trials was to tell a story, or a history, of what had happened and to assign responsibility; to re-produce narrative of much narrated events. But the courts were charged with producing narrative with a unique form of authority. When courts make judgements they have the power to enforce those judgements; they have at their disposal the power to award damages as well as a monopoly upon legitimate violence. Their judgements, therefore, claim a particular authenticity; legal processes claim for themselves, and hope to be recognised as, producers of impartial judgements.

These cases were both concerned with events which happened outside of the territory of the UK; events, in fact, which happened outside of any particular national territory. But the Holocaust was not only geographically cosmopolitan. It was cosmopolitan in a whole number of other senses which I have so far discussed in this thesis. It was the business of the whole of humanity. So when it is the task of courts to make judgements concerning the Holocaust, then they find themselves having to judge cosmopolitan events from a cosmopolitan point of view: that is, from an impartial, and therefore, not from a national point of view. These two cases were cosmopolitan trials but they were held in British courts under British law. They can be seen, therefore, as trials which are between cosmopolitan and national; which have characteristics of both; which are perhaps part of a development or a transition.

The main trial at Nuremberg was only the spearhead of the international process of judging those responsible for the Nazi crimes. As well as the twelve other trials organised by the international tribunal, there were also many national post-Nuremberg trials organised by the successor-regimes in the countries which had been invaded, such as Poland, Hungary, Yugoslavia, Greece, Russia and France. These trials prosecuted those whose crimes could be localised in particular jurisdictions.

The trial of Adolf Eichmann in 1962 was fundamentally one of these national post-Nuremberg trials, though it had a number of peculiarities. Eichmann's crimes could not be localised in a particular jurisdiction, since his job was in the organisation of the genocide of the Jews across Europe. Yet he had not been considered an important enough criminal to be included, even if *in absentia*, at the time of the main trial at Nuremberg. Thus, the trial of Eichmann in Israel follows the pattern of the other national

¹ This account is based upon my own observation of the trial

trials. His crimes were against Jews, and so he was tried by the national courts of the Jewish state; not because he had committed his crimes there, but because, retrospectively, he had committed his crimes against its citizens. The Jews, in the absence of an international criminal court, argues Arendt “had as much right to sit in judgement on the crimes committed against their people as the Poles had to judge crimes committed in Poland”².

The trial of Klaus Barbie in 1987 for crimes against Jews in France and also crimes against the French resistance during the war was more straightforwardly a national trial even though the charge was actually crimes against humanity. Barbie had been the head of the Gestapo in Lyon, and so it was France who assumed the right to extradite him from Bolivia and put him on trial.

These post-Nuremberg trials have contained a strange mixture of national and cosmopolitan law. They followed the legal precedents set by the Nuremberg process, and they convicted for the cosmopolitan offence of crimes against humanity. But the courts were national criminal courts and relied on the normal processes and institutions of criminal justice. There was always a tendency for the trials to drift back from a cosmopolitan to a national perspective. Arendt was critical of the Eichmann trial when it drifted away from its central concerns with Eichmann and the Holocaust and towards issues more concerned with Israeli nationalism, the legitimacy of the state of Israel, and when it glossed over issues concerned with Jewish collaboration with the Nazis.³

Finkelkraut, similarly, was critical of the Barbie trial when it drifted away from its

² Arendt, H. (1994). *Eichmann in Jerusalem - A Report on the Banality of Evil*. Harmondsworth, Penguin. P. 258

³ Arendt (1994).

cosmopolitan focus towards the needs of French nationalism and the continuation of the French national myth of resistance to Nazism.⁴

The trial of Andrei Sawoniuk in 1999 may also be seen as a Nuremberg successor trial. It was, however, carried out in Britain, not because the crimes were committed in Britain or against British citizens, but because Sawoniuk himself had settled in Britain, and had British citizenship.

Since the Nuremberg trials, it has been an accepted norm of international law that jurisdiction over war crimes and crimes against humanity is universal. Such crimes, like those involving slavery and piracy, are understood in international law as an attack not only on the particular state in which they were committed, but also on the international order. Any state, therefore, has the right to try a suspect for such crimes under the universality principle. However, when the British Home Secretary, in 1988, was faced with calls for the prosecution of suspected war criminals living in Britain, he argued that

[t]he British courts have jurisdiction over British citizens who have committed manslaughter or murder abroad, but do not have jurisdiction over people who may now be British citizens, or who may now live here and have done so for some time, if the allegations relate to events before they became British citizens or before they came to live here.⁵

The enquiry which was set up by Parliament argued in its report that the proposed new law in Britain would “merely empower British courts to utilise a jurisdiction already available to them under international law”⁶. There was a somewhat ambiguous legal situation. Under international law, Sawoniuk could have been put on trial at any time since he entered Britain in 1946, and he could have been charged with war crimes or

⁴ Finkelkraut, A. (1992). *Remembering in Vain: the Klaus Barbie Trial and Crimes Against Humanity*. New York, Columbia University Press.

⁵ Hansard, *Official Report*, London, HMSO 8 Feb. 1988, col. 32.

⁶ *Report of War Crimes Enquiry* London, HMSO, 16 June 1989, para 1.6.

crimes against humanity. Authority for such a trial was only granted under British law by the War Crimes Act 1991. This Act limited the charges which a suspect could face to murder or manslaughter in contravention of the laws and customs of war, and so did not allow suspects to be charged, more appropriately, with crimes against humanity or genocide.

Sometimes the USA, Canada and Britain have simply deported suspected war criminals without a full trial, thus exposing them to whatever consequences they may have to face in the country to which they are deported. The British, after the 1991 Act took responsibility to try such suspects themselves, even though they subsequently deported Konrad Kalejs in January 2000, claiming that there was insufficient evidence for a trial, though it seems they had not searched very hard for such evidence.⁷ As a matter of natural justice, it seems right only to contemplate deportation to jurisdictions able and willing to conduct a fair trial. Where this is not possible, a trial rather than a deportation must be preferable. There had been one prosecution in Britain under the 1991 Act before that of Sawoniuk, but the Serafinavic trial was abandoned when the defendant became ill. This decision was vindicated when he died shortly afterwards.

The trial of Sawoniuk was a hybrid of national and cosmopolitan law. It was tried under British law and in a British court; but the crimes had not been committed in Britain, and so the legitimacy of the trial relied on the fact that such crimes, according to the principle of universal jurisdiction, may be tried anywhere, and by any state.

⁷ Dodd, V. (2000). 'Deportation, not trial, for Nazi war crimes suspect'. *The Guardian*. 04/01/2000 London p. 1.

a) The ordinary and extra-ordinary Andrei Sawoniuk

Andrei, Andreivich or Anthony Sawoniuk is in many senses, an ordinary man. Physically, he is not tall. Aged 78, his hair is white and carefully barbered. He has a round baby face with blue grey eyes peering through his up-to-date glasses. He is always dressed smartly, in a blazer, creased trousers, shiny shoes, like the old Polish soldier and British Rail ticket collector that he is. He limps, with a stick, but does not seem particularly fragile because of it. He appears alert, not intelligent, nor educated, but maybe street-wise, stubborn. He seems to be a man who knows how to look after himself. He sits in court next to his solicitors, not in the dock, since he is on bail. He follows the transcript of the proceedings as it appears on the lap-top computer in front of him. He occasionally whispers, rather loudly, perhaps because of his partial deafness, to his solicitors. They seem friendly and call him Tony. Not once in the whole trial did Sawoniuk look to his right toward the press gallery, or, above that, the public gallery.

He was born in Domachevo, a small, ordinary town, which is currently in Belorus, near Brest-Litovsk, and was just inside the Polish border of the old Soviet Union. When he was born there on March 7th 1921, it was in Poland. Domachevo's main business was tourism. It had a spa and some hotels and guest houses. Domachevo conformed to the strange ethnic division of labour which was common in Eastern Europe. The town itself was almost entirely Jewish while the surrounding villages where the peasants cultivated the land were almost entirely non-Jewish. The Jews supplied goods and services to the farmers, as well as to visitors. The farmers sold their produce to the Jews in the market. Everyone who testified at the trial, the non-Jewish witnesses and Ben-Zion Blustein, one of the very few surviving Jews from Domachevo, said that the two populations lived

together in harmony. As well as the Russian Orthodox church in Domachevo there was also a Catholic church, where those who considered themselves Polish worshipped.

Domachevo was a town like many hundreds of others which was soon to be engulfed by the Shoah in an entirely typical way.

Sawoniuk himself was born and lived his childhood outside of the established division of labour, or perhaps underneath it. His family did not have land to tend and so they lived in the town itself. His mother made a meagre living by doing laundry and other casual work for Jews, and when he was old enough, he also worked for Jews, doing odd jobs where he could find them. He never knew his father, and his mother died when he was a child. He was regularly called a 'bastard' and was subjected to a certain amount of bullying on that account. After his mother died he lived with his grandmother and brother, Nikolai, or Kola. For these reasons he must have experienced a certain amount of alienation from the society in which he lived and in which he did not really have an established place. He left school at the age of 14. He was known by everyone in Domachevo simply as Andrusha, a diminutive of Andrei. Little Andy. He was still known by this diminutive when he was the commandant of the local Nazi-organised police force.

The German invasion of Russia started on mid-summer night, 1941 and within hours had swept well past Domachevo which was one of the first small towns it encountered. Within a very few days, the Germans had organised a local police force which Sawoniuk and a handful of other local men joined enthusiastically. He was 20 years old and had experienced two difficult years under Russian occupation. For the first

time in his life he had a job, and a place in the world. He was going to work hard to succeed at his new job.

Sawoniuk has lived in Britain since 1946. He moved around a little, mainly on the South Coast before settling in London, just off the Old Kent Road. He worked for British Rail, and retired in 1986. He married twice after the war, both short marriages, and had a son with his second wife, but they parted shortly after his birth. In Britain he has been, as the police testified 'of good character'.

On the 9th March 1999 he appeared in court no. 12 at the Old Bailey charged with four counts of murder. In many ways it was a routine trial although no trial is routine for those who are involved. The defendants in the courts next door were accused, one of rape and the other of murder. There was no glass dock to protect him from assassination. There was no simultaneous translation apparatus in the court room. It was the usual British court room. The barristers wore wigs. The judge sat underneath the large royal crest on the front wall in his rather grander wig. Sawoniuk was not accused of anything exotic or un-British like genocide or crimes against humanity but of four counts of murder 'contrary to the common law'.

There are also many senses in which this trial was entirely extra-ordinary. It was the first and only trial to be completed in Britain of someone accused of taking part in the Nazi genocide of the Jews. It was the only prosecution under the War Crimes Act 1991. It was the only time that a British court has sat in judgement of crimes committed outside of Britain and the only time a British court has travelled outside of Britain. The trial happened 57 years after the crimes. The crimes were part of the Holocaust, which is perhaps the biggest and most extra-ordinary crime yet committed.

This juxta-position between the ordinary and the extra-ordinary is a theme which runs throughout this particular trial and it echoes a similar dialectic which many have detected within the Shoah itself. Lanzmann⁸ is fascinated by the ordinariness of the trains which transported so many to their deaths. Bauman⁹ focuses on the bureaucratic individuals and procedures which organised the mass killing. Jaspers¹⁰ and Arendt¹¹ wrote about the banality of evil.

And here is Sawoniuk. An ordinary kid, a nobody, who joined the police force in order to become a somebody. When the real function of the police force became clear, some, including his brother, left; he chose to stay. When the Einsatzgruppe came to town to kill the Jews on Yom Kippur 1942, Sawoniuk played a supporting role. The Nazis left to kill the Jews in the next town and the local police were left the job of hunting and killing those Jews who had escaped the main massacre. Sawoniuk took a central part in this hunt and kill operation for a few months until it was complete. Maybe he killed 50 or 100 or 200 Jews at this time and he did so brutally and with more enthusiasm than most. There must have been many tens of thousands like him. They were a necessary, if lowly, part of the machine which committed the genocide. It was the locally recruited police forces who knew the Jews, and who knew where they might be hiding, much better than the invaders did. When it was all over, he found an ordinary life for himself in Britain, and lived it. On 21st March 1996 he was arrested by Metropolitan Police detective, interviewed, and put on trial.

⁸ Lanzmann, Claude (1985) *Shoah*. A film, Paris, Les Films Aleph.

⁹ Bauman, Z. (1993). *Modernity and the Holocaust*. Oxford, Polity.

¹⁰ Arendt, H. and K. Jaspers (1992). *Correspondence 1926-1969*. New York, Harcourt Brace.

¹¹ Arendt (1994).

It was William Clegg, Sawoniuk's barrister, who raised the question of Sawoniuk's ordinariness. One of Clegg's central strategies was to try to make the prosecution look ridiculous and far-fetched. He often employed an ironic and satirical tone, and with some success; he is a warm, witty man with a sense of comic timing. The prosecution presented the enormous tragedy of the Holocaust. The barrister for the Crown, Sir John Nutting, a stereotype of an English establishment figure, tall, with an antiquated upper class accent, slow and methodical, had begun his case. He had used Christopher Browning as an expert witness to paint an outline of the Nazi plan to kill the Jews, of its development and execution. He had followed Browning with a succession of elderly witnesses. All of these witnesses told the same background story, about Sawoniuk, about the German invasion and the setting up of the local police force, and the ghetto, and most had added a particular testament to particular atrocities committed by Sawoniuk. Clegg constantly had to try to change the mood of proceedings for the jury. Clegg had to pull their attention away from the greatest crime in human history and towards the specific charges made against his particular client. He pleaded with the jury, as follows:

Lets be realistic and sensible. It was a ramshackle defence unit. He was just an ordinary policeman. He was no decision-maker. There was nobody of lower rank than him. He was 20 or 21 years old. You may have felt that there's been an attempt to elevate his position. What has Browning's evidence about Hitler and Himmler to do with him? Hitler didn't have a hot-line from Berlin to his hut in Domachevo. "Its like comparing Churchill to Pyke in Dad's Army"¹²

Later, in his closing statement, Nutting returned to Clegg's Dad's Army theme and to Browning's evidence:

He told us of the Einsatzgruppen and their murders in the Brest region: 1280 Jews in July; 3,123 Jews in August. You have heard eye witnesses' views of the

¹²

19 March 1999

ghetto. Mr. Blustein's evidence of the fear, deprivation, restrictions, confiscations, collapsing morale, the preparedness for collective death. The ghetto was policed from the new police station at its gate. The defendant and Kazic Millart beat up Rachel Schneider for smuggling potatoes. The police patrols to prevent escapes. *[with rhetorical force]* This defendant was no Pike! This Police Unit was no Dad's Army!¹³

Inevitably, the trial raised the question of responsibility for the genocide. Who was responsible? Who can be responsible for a crime so huge that it can only be perpetrated by the mobilisation of the resources of a whole state?

Goldhagen¹⁴ argues that the responsibility for the Holocaust rests firmly with Germany, the German people, and their political institutions. They are the ones who are responsible. They were "Hitler's willing executioners". Indeed Nutting made use of Goldhagen's phrase in his summing up:

the defendant played an effective part in the search and kill operation after the 20th September 1942. Hitler needed willing executioners. The crown's case is that the defendant in one town and with the killing of a limited number of Jews played a part, however small, in carrying out this policy.¹⁵

Goldhagen wrote his book in order to prove German collective guilt, and thereby, everybody else's collective innocence, yet Sawoniuk was not German. In Domachevo, the main massacre of the Jews was carried out by a unit of Einsatzgruppe men, who were German, and assisted by a number of Ukrainians, and also by the local police. It is inconceivable that Sawoniuk was not present, since he was an important member of the local police, and this was the biggest day requiring 'policing'. He claimed that by chance, he went away for the weekend to visit friends ("I can't remember the name of their village, I can't remember the names of the friends"). Yet, the central perpetrators of the main massacre were indeed German. This was a theme which Clegg touched on more

¹³ 24 March 1999

¹⁴ Goldhagen, D. J. (1996). *Hitler's Willing Executioners*. London, Little Brown and Co.

than once: the Germans killed the Jews, the local police carried out normal police duties and the war against the partisans. This, however, was not true. Germans led the killing of the Jews of Domachevo, perpetrated the massacre, but relied on Ukrainian and local support both for the main massacre itself and also for the subsequent search and kill operation.

It is the function of the court of law to extract Anthony Sawoniuk from the enormous machine of the Third Reich. The Nazi movement committed the crime, yet in a court, the individuals who were part of that movement are transformed from footsoldiers and bureaucrats back into responsible human beings.

The extra ordinary history of Europe in the middle of the 20th century had transformed Sawoniuk as a young man from an ordinary human being into a sadistic killer. He had succeeded in transforming himself back into an un-remarkable railway worker after the war. But the court demanded more of him. It demanded that he take responsibility for those crimes he had committed during the time when he was part of the genocide machine.

At one point during his cross examination Sawoniuk lost his temper. He shouted at the jury:

Andrusha Andrusha Andrusha. They say only Andrusha Andrusha. No-one else killed no-one. Only Andrusha. Everyone else just watches and claps. Only they pick on me.

Nutting might have replied 'No, Mr. Sawoniuk, it isn't fair, is it? So many were guilty and it is only Andrusha who stands trial...' There must be many thousands of old men in Europe who committed crimes worse than those committed by Sawoniuk. Some of the members of the Einsatzgruppe who actually committed the main massacre in Domachevo

must still be alive, reading about the case in the newspapers. So Sawoniuk is certainly unlucky to be held accountable in this way.

The Sawoniuk trial was emphatically a post cold war trial. The KGB had been interested in Sawoniuk since they first investigated, during the Russian re-occupation of Belarus in 1944. But it was not until 1959, when they intercepted a letter that Sawoniuk wrote to his brother Kola, that they knew that he had settled in Britain. It was only in 1988, at the very thaw of the cold war, that they passed Sawoniuk's details to the British Government, and it took them another 2 years to trace him, because they had more important war-time criminals to chase, and also due to a mis-translation of his name.¹⁶ The trial required the co-operation of Belorussian, Russian and Polish authorities. It is difficult to imagine the old Soviet Union allowing British police officers to interview suspects and a British court to sit in Domachevo.

Sawoniuk was charged with four counts of murder 'contrary to the common law'.

In order to convict under the War Crimes Act (1991) Prosecution had to show:

1. The Crime was committed during war time 1939-1945
2. It was committed in the territory occupied by Germany
3. It was in violation of the laws and customs of war
4. The defendant lived in the UK before 1991

Each count related to an incident of murder and each was alleged by a different witness.

Following the testimony of the expert witness, the whole court travelled to Domachevo; the Judge, the lawyers, the jury, the stenographers, court officials and the press. The court list at the Old Bailey in London read 'Court sitting in Domachevo'. During his opening statement Nutting had given the jury many photographs of

¹⁶ Cesarini, D. (1999). 'At Home With Hatred' *The Sunday Times*. 04/04/1999 London

Domachevo and had taken much time going through them, explaining each one. There were aerial photographs, including one taken by allied bombers during the war; and photographs of the town as it is today; and photographs of the paths travelled by the witnesses who alleged counts of murder. During the trip to Domachevo, the court followed the paths travelled by the witnesses and gained an over-view of the town. Fedor Zan, a central witness, had been sworn in before the trip, and showed the jury where he had seen Sawoniuk shooting people.

Domachevo was under snow at the time of the visit. Much effort seems to have been made to keep the jury away from contact with the press and the locals. A newspaper report tells that the jury were “held virtual prisoners in the Intourist Hotel, a hostelry exuding all the charm of a tax office” while the prosecution and defence teams enjoyed the hospitality of the only Indian restaurant between Warsaw and Moscow. The same report tells us that during the tour of Domachevo, Nutting “strode about in the manner of a grand Shakespearean actor-manager”, puffing on his pipe, the judge wore a “pointed red hat with ear-flaps as though it were an Arctic-grade Judicial wig” and Clegg made do with a brightly patterned Austrian ski jacket.¹⁷

The problems involved in the Sawoniuk prosecution may be divided into two types. Firstly there are the problems which relate to the legitimacy of the whole legal process, and secondly the practical problems. I have discussed many of the first type already in this thesis, such as problems of individual responsibility, charges of victors’ justice and *tu quoque*, of the impossibility of rendering justice in a court for crimes on such a scale.

¹⁷

Hamilton, A. (1999). ‘Jury’s Journey to a World Between Past and Present’ *The Times*, 2/04/1999 London, p. 3

Some of the many practical problems which arose in the Sawoniuk case will arise routinely in crimes against humanity investigations, while some of them are specific to this trial. In an ordinary murder investigation, the police have control of the crime scene, often very soon after the crime is committed. This is unlikely to be the case where the crime is being carried out by a formation which has state power. Thus the immediate identification and interviewing of witnesses and suspects will often be much more difficult, as will the gathering of fresh forensic evidence. Another difference is that in an ordinary murder investigation, it is unlikely that there will be widespread support for the murder among potential witnesses, as there may well be in these cases. In the Sawoniuk case, nearly all the possible Jewish witnesses were dead, as a result of the crime. In the Sawoniuk case, the crime was being investigated by the British police, but within the jurisdiction of Belarus and of Poland. Potential witnesses were always interviewed in the presence of officials of the local state. Clegg told me that he felt that potential defence witnesses were intimidated by local officials, who were keen to secure conviction. This intermeshing of different jurisdictions is likely to be a common source of problems in these cases. The jurisdiction which is carrying out the investigation does not have state power.

Difficulties of communication will also be a frequent problem faced by these trials. Often, evidence and interviews have to be mediated through interpreters. At the least this is a source of great expense, and may present more fundamental barriers to the process.

There was a further practical problem in the Sawoniuk case, which it is to be hoped, will not arise commonly: that is the problem of the trial taking place so long after

the crime. All the witnesses were elderly, struggling to recall details of traumatic events they suffered and witnessed as young people. Their memories must be mediated by 57 years of remembering and re-telling the story; and of hearing accounts, gossip, and accusation.

b) Ben-Zion Blustein: Holocaust memoir and legal testimony

On its return from Domachevo back to the antique wood panelling of the Old Bailey, the evidence presented by the prosecution started with the only Jewish witness, Ben-Zion Blustein.

Blustein seemed to me to be a very typical Jewish Holocaust survivor. He appeared tough, but now old; a little stiff. He had a definite confidence in his story, combined with a nervous vulnerability: the vulnerability of one who knows that nothing in life is safe and that no safety is absolute. Many Holocaust survivors have a typical way, genre perhaps, of telling their story. What made Blustein so uncomfortable in the Old Bailey was the fact that he was not allowed to tell his 'usual story'. Blustein has told his story often. He has told it at Yad Vashem. He has told it to a ghost writer who wrote it into a book. He has told it to students and to school children. He has told it to family and to friends.

Primo Levi¹⁸ writes of the way in which his inner drive to tell of what happened was part of his motivation for keeping alive in Auschwitz. He also writes of the importance of testimony, and of the importance of being believed. His recurring nightmare at Auschwitz was to tell his story to friends and family and for people simply

¹⁸ Levi, Primo. (1987). *If This is a Man*. London, Abacus.

to ignore his voice, not to hear his voice. The fear that people on the 'outside', in the 'real world' would be incapable of even hearing of another universe. The fear that Auschwitz was literally, another universe.

Blustein must have been telling his story, attempting to 'represent' the dead Jews of Domachevo and of Europe for his entire adult life. It is certain that when he does so in Israel, he is met with silence, with sympathy, and with sorrow. He is a survivor-hero in Israel, amongst Jews, amongst anyone who has any kind of human feeling and who hears his story.

However, a court of law is not guided by human feeling; it is guided by its own rules and function. The court is not centrally interested in Blustein, it is focused on Sawoniuk. The court is not interested in the thousands of dead Jews of Domachevo, but in the 21 Jews who are mentioned in the indictment.

The prosecution was only interested in parts of Blustein's story, those that it wished to use to construct the case against Sawoniuk. It was not interested in Blustein's dreams and his fears and his demons. It was not interested in his philosophising or his anger, or his last conversation with his mother.

Cross-examination is Primo Levi's nightmare come to life. An educated, intelligent articulate person is paid by the state, in the interests of the Nazi killer, to act the part of the friend who refuses to hear.

The British court was making great efforts to appear disinterested and neutral; simply balancing the arguments. It almost appeared embarrassed by Blustein's Jewishness. When the jury had been sworn in at the beginning, they were told that if any of them had relations who had suffered in the Holocaust, they should excuse themselves

from service. Probably, then, there were no Jews in the jury; Jews were considered unsuitable to serve in such a jury. Jews, as witnesses, or as jurors, were suspected of being unable to 'put aside their feelings', as the jury was asked to do, both by the prosecution and the defence in summing up.

It seemed to me that Blustein was one of those Israelis who feels that the only safe place for Jews is Israel, more particularly that Israel is the only safe place for him. So, being a witness in this court, and undergoing cross examination must have been, and appeared to be, an unpleasant and uncomfortable job for him.

Dan Stone writes about Holocaust testimony, and the ways in which many historians of the Holocaust have under-valued survivor testimony in relation to more 'solid' types of evidence such as documentation.¹⁹ Jean-François Lyotard has argued that a part of the enormity of the crime of the Shoah was that it eradicated the witnesses and the evidence, it made it impossible to exactly re-construct or represent the events.

Stone quotes Lyotard as follows

The "perfect crime" does not consist in killing the victim or the witnesses... but rather in obtaining the silence of the witnesses, the deafness of the judges, and the inconsistency (insanity) of the testimony.²⁰

Stone adds that

In other words, it is the attempt to gain cognitive control over the events of the Holocaust, to master them by fitting them into existing narrative frameworks... that really constitutes a "wrong" [tort] to the victims. In attempting to counter this wrong, Lyotard puts forward the notion of the Holocaust as a sublime event, as "sign of history" which must be "felt" rather than known because the magnitude of the event has rendered the usual instruments of measurement obsolete.²¹

¹⁹ Stone, D. (2000). 'Holocaust testimony and the challenge to the philosophy of history'. in *Social theory after the holocaust*. R. Fine and C. Turner (Ed). Liverpool, Liverpool University Press, Chapter 11, pp 219-234

²⁰ Stone (2000) p. 220

²¹ Stone (2000) p. 220

Stone argues that survivor testimonies, full of both traumatic truth and factual inaccuracies, transcend traditional forms of writing histories. That

testimonies make more clear than other evidence why the excess of the Holocaust breaks the bounds of 'normal' philosophy of history, ... and that this is the primary reason why historians tend to shy away from testimonies...²²

Many have been critical of attempts to capture the Holocaust, or elements of it by means of representation. Hence Adorno's proposition that there can be no poetry after Auschwitz. Hence Claude Lanzmann's refusal to use archive footage or re-construction in *Shoah* and his outrage at Spielberg's Hollywood production.

The court required a different method of finding and understanding the truth. Different to Lyotard's 'feeling' of the event; different from survivor memoir; different from Lanzmann's cinematic presentation of carefully produced and edited memoir; different from Spielberg's representation; different from academic historical investigation.

Academic historical representation and analysis of documentary evidence was fine for briefing the jury on the background to the crimes of Sawoniuk, and this task was carried out admirably by Browning.

But to convict a defendant only direct witness testimony will do, and this testimony, it is hoped, is rendered profoundly different from the memoirs of survivors by the process of cross examination. Documentary evidence, valuable to historians, was rendered inadmissible by the court in the absence of the testimony of the individual who created the document.

One document in particular, which was discovered in a German archive, later became the subject of much argument. It was a document which threw light on

Sawoniuk's story in the period after his time as a policeman in Domachevo when he committed the crimes of which he was accused by the court. The document showed that he had retreated with the German forces when they were pushed out of the region by the Russian counter-offensive, and that he quickly became a member of the a Belorussian unit of the Waffen SS. The judge ruled that this document was inadmissible as evidence since its authenticity could not be verified by a direct eye witness; presumably the creator of the document was long dead.

This document did not help us to know whether Sawoniuk was guilty of the four counts of murder in Domachevo. But it did tell us that he was, or became, a Nazi; and that he won sufficient trust from the SS while he was in Domachevo for them to recruit him as a member. Moreover this unit of the SS was later involved in perpetrating terrible atrocities in the Warsaw region. And it was subsequently moved to France to conduct the war against the partisans, the job which Sawoniuk had been learning in Domachevo. And it was in France, where Sawoniuk turned up and joined the free Polish army, telling them that he had been a member of the SS. We know this from another document, his Polish army record, which was also inadmissible. We also know that this unit of the SS suffered from many desertions in France at this time.

These two documents on their own might be enough for an observer who was persuaded that they came from genuine archives, to come to the decision that Sawoniuk was, at least, a Nazi and almost certainly a mass killer. The jury was allowed to know none of this. I do not know, either, how many other incriminating but inadmissible documents were turned up by the police investigation. The prosecution, in fact, managed to leak some of this information to the jury during its cross-examination of Sawoniuk, but

technically, this evidence was inadmissible and the jury was instructed to ignore it by the Judge in his summing up.²³

So, for the court, documentary evidence is not sufficiently safe evidence on which to base a conviction. Only eyewitness testimony is acceptable. But it is eyewitness evidence given in specific and controlled circumstances. The evidence must be immediate, must be given in person, and must be available for cross-examination.

In the appearance of Blustein as a witness, we can see the difference between the memoir and oral testimony of a survivor-hero, and the admissible legal evidence required by a court of law.

Blustein gave evidence in Hebrew through an interpreter who stood next to him. He was two years younger than Sawoniuk and he knew him as a child. He told the court how he remembered playing with Sawoniuk and his pigeons as a child. "I never let no-one play with *my* pigeons" retorted Sawoniuk later, under cross examination, denying ever having met Blustein, or anyone else who claimed to know him in Domachevo during his childhood.

Blustein recalled the general atmosphere of fear in the Jewish community before the German invasion of 1941. Occupied Poland was, literally, a stone's throw away across the river. He told how he remembered the invasion. He told how, immediately after the Germans arrived they killed the Rabbi of Lubatov, who spent his summers in

²³

"Anglo-American adversary procedure organizes the trial as a battle of wits between the prosecution and defense, with the judge acting as their referee, constantly deciding what line of questioning and what material should be allowed to enter the minds of the jury. Yet the judge's authority in this respect may be more official than real: a skillful lawyer will be able to make his point before his adversary can open his mouth to object. The resulting wrangling on admissibility and the judge's ritual exhortation in summing up what points to disregard – for example, the political loyalties of the defendant in an espionage trial – only make the forbidden fruit more tempting to the jury than all the rest." - Kirchheimer, O. (1969). *Political Justice – The Use of Legal Procedure for Political Ends*. Princeton, New Jersey, Princeton University Press. p. 342

Domachevo, along with 40 of his followers; they killed a few other leading Jews as well. Blustein told of the creation of the local police force and how Sawoniuk joined at the outset; he told of the establishment of the ghetto in Domachevo three weeks after the invasion; how it was fenced in with barbed wire, how the police station was moved to a building at the gate of the ghetto; how Jews were forced to wear yellow stars; how Jews were not allowed out of the ghetto; how the morale of the Jews of Domachevo decayed with hunger and disease until “the living envied the dead”.

He told how, on the Friday before Yom Kippur 1942, Jews were ordered to present themselves with shovels, and were ordered to dig mass graves “in which to bury large numbers of prisoners”. And that shortly afterwards the ghetto was surrounded by Ukrainians and Germans who had arrived from out of town. And how his mother was “almost certain” that the Jews were going to be killed and so they hid in a pre-planned hiding place in the cellar of their house in the ghetto instead of reporting for ‘parade’ as ordered on Yom Kippur. I reproduce my notes from the trial:

Nutting: What did you hear?

Blustein: At this stage of my testimony is the most difficult time of my life. I dream about it. Think about it every day. I had a dilemma whether to come to this trial. It is difficult to talk...

N to interpreter: We would be grateful to have his testimony

Blustein still talking about his difficulties - dreams – etc. ... Clegg, defence counsel, shakes his head sadly as if saying that this display of emotion must stop

Judge (*politely, gently*) Answer the questions directly

Blustein: We heard lots of shooting. Shots and cries. We understood what was happening there.

Judge: Answer the question only – What you heard

Nutting: That evening after the shooting stopped did you hear anything to indicate that those who had left that morning had returned to their homes?

B No

N What did you decide to do?

B Where could we go? If they'd done this here they'd have done it everywhere. *The family decided (led by mother) to commit suicide.*

N Your step-father had access to drugs at the clinic?

B He had a bottle of morphine and some powder. We took leave of one another. My father swallowed the morphine and we swallowed the drug. My step-father was the only one who died. We remained in hiding for the next 8 days. Mother decided to cut our veins. Or could we burn down the ghetto at least? We came out to burn down our house but then realised there were others alive in hiding....

Nutting, interrupting: What did you do?

B My mother said to me don't kill yourself. Maybe you can live. I said Mummy how can I leave you? She ordered me to leave. I departed from my mother and the children. I left the hiding place and fell down and fainted, I don't know for how long. I went up to the attic. This took me some time. I was very weak. I remained there for 2 days.

N What did you see through the tiles?

B I saw the Ukrainian police take out a Jew, 80 years old, named Shaya Idel. This happened 20m away. He was wearing his prayer shawl and tefillin. He was carrying a book, I imagine the Talmud. His prayer shawl was red with blood. The police were following him, stabbing him with their bayonets. They set fire to his beard and sidelocks. He didn't cry out.

N Did you recognise anyone who took part?

B Andrusha...and many others. They dragged him away.²⁴

The court listened in silence. Blustein was tired and emotional. The mediation of the interpreter made everything more difficult and slower. This was Blustein's Holocaust memoir. Undoubtedly he had told the story many times before. Blustein wanted to tell *his* story and the story of *his* family and of the Jews of Domachevo. All the emotion made the court, the legal process, uncomfortable. The two lawyers and the judge were constantly having to encourage Blustein to answer the questions, to allow the court and its rules to take the lead, to be in charge. Blustein wanted to tell his story, but the court wanted to hear 'evidence'.

Only after many hours of testimony, did Blustein mention Andrusha, in passing. Sawoniuk was not charged with killing Shaya Idel. Yet Blustein, with one remark, had clearly implicated him in this murder. Did Blustein really remember Andrusha's presence at that particular incident, 57 years on, after having hidden in a cellar for 9 days without food or drink, after having taken drugs to kill himself and then spending two days

semi-unconscious? Now, at this trial, Sawoniuk was central; but at the time, for Blustein, it was Shaya Idel who was central and Andrusha was no more important than any other policeman or soldier present. Can we be sure that he accurately remembered Andrusha's presence? The jury was being presented with 'inadmissible' evidence as to Andrusha's guilt in a murder of which he was not accused. No-one can doubt that Idel was taken off and killed. Yet there is no evidence. Later in the trial, Clegg was to argue for the judge to throw out the whole case against Sawoniuk for reasons such as this. There were other murders in which Sawoniuk was implicated by witnesses but not charged. This evidence was therefore inadmissible and, argued Clegg, highly prejudicial. And when, in the end, the jury came to consider Sawoniuk's guilt or innocence for the two remaining charges, they must have been influenced by evidence such as this. They were able to say to themselves, 'We know Sawoniuk is a killer and a torturer; we must therefore take the opportunity of convicting him on the two charges, whether we are convinced of those two particular charges or not.' In normal life, we put together many disparate pieces of 'doubtful' evidence together to make a whole. We add them up. In court, doubtful evidence detracted, rather than added, to the clarity of the truth.

A German truck had entered the ghetto while Blustein was watching and wondering what to do. It had a number of Jews on the back, who jumped off the truck and went to collect some personal belongings, bedding, and such like from their houses. They had been saved by the Germans to use as slave labour. Blustein was able to join the group, and thereby to secure work for the German mounted police unit looking after their horses.

While Blustein was working at the base, he saw a Jewish friend of his, Mir Barlas, after he had been captured and interrogated. The murder of Mir Barlas constituted Count 4 of the indictment against Sawoniuk.

Nutting In what condition was he?

Blustein Very bad. I saw him after a German interrogation. The Germans gave him to the Ukrainian police.

N Whose custody?

B A number of policemen. Amongst them was Andrusha Sawoniuk.

Blustein had a conversation with Andrusha a few days later.

N What did Andrusha tell you?

B I understand that he killed him. He told me that Barlas was very courageous. He said that we will soon meet again in the next world.

N Did you ever see Mir Barlas again?

B No

N Did you have any other conversations with Andrusha?

B I was looking after the horses at night. Andrusha entered for warmth. He said “don’t think you’ll live forever”. When the Germans leave they’ll hand you over to us. “We’ll massacre you as we’ve massacred many”²⁵

Blustein’s evidence was entirely credible. No-one, usually, would either wish, or dare, to question a single word of it. But it was Clegg’s job to do so and he managed to create some doubt as to Blustein’s accuracy, and even, as to his honesty.

Blustein was cross-examined for two days. It was a fascinating confrontation. It was cruel, dramatic, informative, thought-provoking and sometimes funny. Blustein was determined not to give an inch; he was stubborn, intelligent, defensive and sometimes ironic. When he was in danger, when Clegg was having success with some small point that he was pursuing, Blustein’s characteristic response was “It doesn’t matter to me!” or “I was not interested in such things”. Blustein was interested in the killing of the Jews and of his family. The court was interested in Sawoniuk, the four counts, and various details, which may have been important. All of the witnesses, for example were asked many detailed questions about the uniforms of the local police force. Probably Clegg was

trying to construct an argument relating to uniforms but was, in the end, on the evidence, unable to do so.

Clegg Can you tell me about the police uniforms. Did they have uniforms in the first few days after the German invasion. Wasn't it later?

Blustein This thing didn't interest me and I didn't know about it. I still think they had uniforms very soon after the invasion.

C Do you remember giving evidence last year in the Magistrates Court?

B Yes

C What did you say about police uniforms?

B I don't know.

C You said "They eventually had a uniform". Remember?

B No

C Do you accept that's what you said?

B Yes. But it makes no difference.

C That's not what you said yesterday.

B It is not my duty to know about uniforms

C Early on, 50 or so people, mainly Jews were killed?

B "I'm only talking about Jews"

C Some gentiles were also killed?

B maybe. I don't know who.

C Communists maybe?

B "It didn't interest me"²⁶

And then an ideological disagreement:

C The Germans didn't confine their murder to Jews?

B They also killed the mayor and his son and another policeman.

C Yes. So the Germans killed Jew and Gentile?

B The Jews they killed because they were Jews. Others they killed because they feared they were against them.

C They killed Communists because they were Communists?

B *No answer.*²⁷

There were three measures that Clegg possessed with which he could test

Blustein's story. One was his client's story. This wasn't very useful to him, since he

must have been well aware that his client was lying about almost everything. The second

²⁵ 24 February 1999

²⁶ 24 February 1999

²⁷ 24 February 1999

was to test Blustein's evidence against its own internal consistency. The third was to test Blustein's evidence in this court against previous versions of his own testimony.

It must be one of the unique features of this case, that the witness was confronted with a statement he had made in 1944, two years after the offence, but 55 years before the trial. The prosecution was in possession of a signed statement Blustein had made to the NKVD, forerunner of the KGB, after the Russians had driven out the German forces. The story that Blustein had told the NKVD was significantly different from the story that he told in court 55 years later. Much of the difference was easily explainable; Blustein admitted that he lied to the NKVD because he was afraid of them. Yet his whole story in the NKVD statement was different. He had told them that he and his family had hidden in the woods, not in the cellar, that they had hidden for 3 days, not for 9 and that his mother had been caught and shot. Why was his story so different?

Clegg: Can you confirm that is what you said in 1944?

Blustein Mostly

C Lets go through it sentence by sentence. *Does so, at length..*

C Did you give a wholly different account to the Russians in 1944 from what you say today?

B Not completely

C You would have had a motive for lying about your work, as a telephone engineer under German occupation before the massacre, so that you couldn't be accused of collaboration. You would have had no motive for lying about where you hid?

B The NKVD official wrote what he wanted. I was waiting for him to finish and let me go.

C You read and signed it?

B I can't remember. I would have signed anything.

C Why did you lie about hiding in the woods rather than the ghetto.

B I didn't want to get into an argument with him. Maybe he was drunk. Who knows?

C Was he unsteady on his feet?

B I don't know he was sitting down.

C Were his eyes glazed? Was his speech slurred?

B I can't remember.

C You have no motive for giving a different account to the Russians?

B My evidence was the same as I've said here. What he wrote was up to him. I wanted him to finish so I could leave. "It didn't make any difference to me what he wrote".²⁸

Blustein's strategy was to be entirely indifferent. He is not used to being asked such impertinent questions. His answers seem to be those which would satisfy a group listening to the story of a survivor-hero. Maybe the Russian was drunk? Of course! Everyone knows that Russians are always drunk. But in the court, it is different. Blustein's story is that he told the NKVD man his correct version, the man wrote whatever he wished to write, and Blustein signed it in order to get away from the NKVD quickly and unscathed. It is perfectly plausible. But why would the NKVD man have changed 3 days to 9? And why would he have changed the cellar into the wood? And Blustein's reply is, of course, "who cares?". He is not interested in that; he is interested in telling the world that everyone he knew was killed on Yom Kippur 1942 and that Sawoniuk was involved.

Blustein claimed too much. He claimed that his evidence was infallible in every respect. He used the word "holy" to describe it. He did not trust the court to assess his evidence fairly, to use its judgement in interpreting his honesty. So he claimed that every single word was exactly true. Clegg had little difficulty in comparing his words at the Old Bailey with his words the year before in the magistrate's court, and his original statement to the British police, and in his testimony to Yad Vashem and in his book and in his NKVD statement, and discovering small but definite differences in each account.

This was the cross examination that related directly to the killing of Mir Barlas,
Count 4:

²⁸

25 February 1999

Clegg Turning to Mir Barlas. You couldn't see which way they went on the Borisy Road could you?

Blustein They turned right. They could have gone to the forest or to Domachevo

C You don't know where he went or when or where he was killed do you?

B How could I know?

C The conversation you say you had with Andrusha about Mir Barlas. Did Andrusha say to you that he had killed Mir Barlas?

B Yes

C Not that Mir Barlas had been killed by somebody?

B No

C He said "I killed him"?

B He said "he was very courageous before I killed him. We will see each-other in the world to come". No that's wrong. He said "Before I liquidated him".

C At the Magistrates Court you said that Andrusha did not say "I killed him". You said the opposite.

B What did I say?

Clegg reads it out again, no direct confession

B Even if he did not say to me "I liquidated him" this was the biggest proof that he did it.

C But before, you said that he had said "I liquidated him".

B Yes he said that.

C You decided that Mir Barlas had been killed by Andrusha. That is different from a confession.

C In your evidence to Yad Vashem, transcribed from a tape machine, you didn't mention the incident with Mir Barlas at all. Can you confirm this?

B I don't remember

C In your book 'one of the sheep'...

B I didn't write it. I told it to a woman from Yad Vashem. She wrote it.

C Not one word about Mir Barlas?

B It may be so.

Clegg refers to Blustein's May 1995 statement to the British police

C Not one mention about Mir Barlas or Andrusha confessing to his murder?

B They asked me to remember names of policemen. I remembered Andrusha.

C Is it true that you made no mention of Mir Barlas?

B I don't remember

C Will you accept it from me?

B It could be.

C You described other people's fate. Nothing about Mir Barlas. You were asked "What can you tell me about Andrusha?" Why didn't you tell them about his confession?

B I told them about tens or hundreds that he killed. For me it held no special meaning. I could even now give you more names of people he killed that I haven't mentioned...²⁹

It seems likely that the truth was that Sawoniuk had said something to Blustein along the lines that he gave in his first examination by Nutting, something like “Mir Barlas was very courageous before he was shot.” This was the story Blustein had told to the British police, to the Magistrates Court and to Nutting. In this cross examination he changed his story, claiming that Andrusha had used the words “I liquidated him.” I think it is fairly clear that Blustein was making it up. Blustein was trying to make sure Sawoniuk was convicted by claiming that he had said those particular words. And Blustein had also claimed that he remembered the words exactly, word for word.

Judge Potts accepted Clegg’s argument. He judged that since Blustein had given a different story in his evidence-in-chief and in his cross examination concerning Sawoniuk’s confession that this evidence could not be relied on to make a safe conviction. It is interesting that in his many accounts of events in Domachevo, Blustein had never mentioned the fact that Andrusha had confessed to the murder of Mir Barlas. Is it possible that Blustein invented this incident after he knew who the defendant was? That was Clegg’s inference in cross examination. And Blustein’s answer? Who cares? . “I could even now give you more names of people he killed that I haven’t mentioned...” The jury, in a murder trial heard this accusation. It was entirely ‘inadmissible’, and entirely ‘prejudicial’, and probably also entirely true.

c) The evidence of the local witnesses

The court moved on to hear the evidence of the non-Jewish Belorussians who had travelled from the region of Domachevo to give evidence. They had all been to Britain before, for the magistrate's hearing. Apart from these trips to London, I don't think any of them had travelled very far from Domachevo during their entire lives. It must have been exciting, to be picked out of the crowd, to be made to feel important, to be flown off to London, and to be put up at a nice hotel. A lawyer in the trial told me, only half jokingly, I think, that it was impossible to get Gallina Pushkina out of the bath in her hotel in order to discuss her evidence.

Nutting began his examination of Pushkina full of self-consciously absurd Englishness: "May I be so ungallant as to ask your date of birth?" he asked. She spoke Polish, through an interpreter and was sixty-eight years old. She had lived in Domachevo during the war and was a eleven years old in 1942. She offered a lot of coherent and cohesive background evidence about Domachevo, and the setting up of the police force following the invasion: she remembered Sawoniuk and told how he had joined the police force. "Judging from the way he behaved afterwards, I believe he joined voluntarily".

The most interesting evidence she gave was about the day of the main massacre of the Jews on Yom Kippur 1942. It was a Sunday.

Nutting What happened when you arrived at church?

Pushkina We heard a fairly loud noise come from the ghetto

N What sort of sounds?

P Lots of people crying and shouting

N Did you see what happened?

P No. We heard it. I did see the people who were crying

N Could you tell me why they were crying and shouting?

P "Of course I do, they were all being taken to their death"

N Who was taking them?

P "The local police and the Germans"

N How many Jews were there?

P Lots. Absolutely lots. Around 2000. This was right at the beginning. We were taken out of the church by a German who had a translator with him and told to watch. We were standing outside the church on the top of the hill looking down into the ghetto.

N That was the first time you saw people being escorted?

P We immediately saw that a large group of people were taken away.

N 2000?

P No much less

N How many, roughly?

P Its difficult to say, 100, 150, 200

N Were they all Jews?

P Yes

N How could you tell?

P They all had yellow sewn-on badges

N Male or female?

P All of them

N Both sexes?

P Yes

N Children?

P And Children

N What sort of ages were they?

P All sorts of ages from the very old to very young children.

N What happened?

P They were undressed before us

N Where did they put their clothes?

P I can't tell you

N Where were they taken?

P They went leftward towards the forest.

N Toward the place marked in the plan as MASSACRE SITE?

P Yes

N Were Germans and Ukrainians participating all the time?

Clegg objects.

Judge: re-phrase

N What were the escort doing?

P Beating them along

N Who were the escort?

P German soldiers and police

N German police or local police?

P Our local police. I can't really remember anybody else.

N Did the group remain in your view?

P They were herded away into the pine forest

N Were the Germans who had ordered you out of the church still there?

P Yes

N Did you see one group or more than one group of Jews?

P I remember 3 groups

N The second group. Was It the same size?

P I find it difficult to say. We were afraid ourselves.

N Were they also told to undress?

P Yes

N Then escorted in the same direction as the first group?

P Yes

N The third group. The same story?

P Yes

N They were told to undress?

P Yes

N Then led away?

P Yes

N Were the escorts armed?

P Yes

N Did you hear shooting?

P "After they took the first group away I heard the sound of machine gun fire"³⁰

A German official was sent to the Catholic church with a translator on the day of the killing of the Jews of Domachevo. His job was to interrupt the Sunday church service and bring the congregation outside of the church, which stood on some high ground, above the ghetto. The Catholic men, women and children were made to watch the final solution to the Jewish problem of Domachevo as though it was a theatrical performance. Why? I can think of two types of reasons. It may have simply been to spread terror. The Catholics were being shown what sort of a regime was in charge; it was one that ruled by means of terror. They were being shown how cheap life was, and they were being shown the fate which could await them also. Alternatively it may have been intended to make the Catholics of Domachevo feel some complicity in the killing. They were being told 'This is what you have always wanted; for the Jews to disappear; for the Jews to be punished; but you were too weak to do it; we Nazis are doing it *for you*.' The killing of the Jews was not a secret. It was not supposed to be a secret. It was not a crime

³⁰

2 March 1999

committed on the quiet or in the shadows. It was done in front of an audience. In Lublin, the concentration camp was on the outskirts of the town and the railway station in the centre of the town; Jews were marched from the railway station to the camp, past the local population. The Nazis had a taste for the dramatic; for a public drama of death.

Pushkina had little more to say about Sawoniuk himself. She did not see him kill or mis-treat anybody, but she was aware of his reputation as a man of power, a man to be afraid of.

All of the rest of the prosecution witnesses spoke Belorussian, and were from Borisy, a tiny hamlet near Domachevo. They were small farmers and their religion was Russian Orthodox.

The first was Mrs. Fedora Yakimuk, aged 73. She was the most 'peasant-like' of all the witnesses, small, wrinkled, old, tough, stubborn and stupid. Clegg entirely broke her down under cross examination and made her admit that all her evidence against Sawoniuk was gleaned from the gossip of the village. Yet, strangely, this did not affect her credibility. Clegg made her look ridiculous in cross examination primarily because she was uneducated, unintelligent, in a wholly foreign country and setting: but not necessarily because she was a liar. The God-mother of Yakimuk's nephew, her sister's baby, was Sawoniuk's first wife, Anna Maslova.

Yakimuk told the following dramatic story:

Nutting Did you used to use a sickle when you worked in the fields?

Yakimuk Yes

N Did you injure yourself?

Y Yes. I cut my shoulder one day.

N How did you treat the cut?

Y My mother bound it up. She put iodine on it. The iodine came through the bandage on my arm as a yellow stain. Andrusha saw me and shouted "*Jude, Jude*" to make me stop. Andrusha and some Germans dragged me away to be

shot. I was crying, begging, kissing their feet. I was on my knees explaining I was not a Jew and pleading for my life. Andrusha knew me very well but he didn't protect me. The German pulled off the bandage and saw the wound. He let me go. This was one week after the massacre.³¹

It is a great story, and the press loved it. The headline in *The Times* was:

"Sawoniuk stood by as I begged for life".³² Undoubtedly it could be true, and for this reason, it is a powerful story. Yet it is just as possible that it was only partly true. Maybe this did really happen to her, but Sawoniuk wasn't actually there? Maybe it really happened, but to somebody else, and Yakimuk was telling it because it was, kind of true, and she wanted to be involved, she wanted the trips to London, and she wanted the bad guy Sawoniuk put behind bars. 57 years is a long time. Mrs. Yakimuk did not do well in under cross examination:

Clegg: You never saw Andrusha commit any act of violence against anyone, did you?

Yakimuk: His behaviour to everyone was violent.

C Yes or No

Y Yes, but we weren't allowed to see it. People did see acts of violence but we weren't allowed to go there.

C: Look at your statement of the 12 February 1997.... Is it a copy of your statement to Scotland Yard?

Y Yes

C Turn to p. 5. "I never personally witnessed any acts of violence during the German occupation" Did you say that?

Y I did not say that

Clegg repeats the quote.. Today you've told us you saw Sawoniuk beat people. You didn't say that to the police, did you?

Y I did see him hurt people towards the Sand hills but I couldn't be close

C You are changing your evidence to fit in with other people's stories

Y I'm telling you what I saw

C You have twice travelled here to give evidence in the company of other people from Domachevo... People in Domachevo are talking about this trial...

Y Yes.

C Everybody's talking about Andrusha?

Y Yes

C It is in the papers?

³¹ 2 March 1999

³² Jones, T. 'Sawoniuk stood by as I begged for life'. *The Times*, London 3/03/1998 p. 5.

Y Yes

C And on the TV?

Y Yes

C Everyone is saying what Andrusha did in the war. But the truth is you never saw anything in the war, isn't it?

Y We weren't allowed to go there

C Its untrue that you saw him beat people, isn't it?

Y People weren't allowed to see..

C You said ten minutes ago that you saw him beat people. You've just been caught out saying something that you never saw, haven't you? Why did you tell us that you saw Andrusha beat people?

Y I didn't say that

C You said it a few minutes ago. You're coming here and repeating a lot of gossip, aren't you?

Y I did see people being driven toward the sand hills

C I suggest you're repeating gossip.

Y I would see people being led away while I was queuing for bread.

C When you said that you saw acts of violence, that's what others have told you?

Y Yes. I saw them led away but I was too afraid to go myself.

C What you were telling me earlier was what others had told you

Y I repeat, I saw people led away and I heard shots

C When you saw the British police you knew they were investigating Andrusha?

Y Yes

C You told them everything you knew about Andrusha?

Y Yes

C Your story about the bandage is not mentioned in your statement. Nothing about anyone or Andrusha herding anyone anywhere... Not a word about anyone being beaten by anybody

Y I did see him leading people away to be shot while I was queuing for bread

C Mrs. Yakimuk, that is something that everyone is talking about?

Y Yes

C But the first time you've said you witnessed it is today

Y I said he drove people to the sand hills. I wasn't allowed to there myself.

C (*bit of a bullying tone..*) You didn't say that in the police statement because he didn't do it...

Y Every morning I went to buy bread...

C Every morning throughout the war you saw Andrusha herding people to their deaths?

Y Yes. I saw this many times.

C Do you remember giving evidence in the magistrate's court?

Y I can't remember

C Do you not remember coming to England last year?

Y Yes

C Mr. Nutting asked you some questions?

Y Sorry, they all look the same... (*Nutting is tall and thin and Clegg is shorter and a little round.. Everyone laughs*) You could be brothers!! (*Yakimuk enjoys the laugh that she is getting*)

C (*Clegg, after having enjoyed the joke with everyone else, suddenly turns serious again*) Andrusha is on trial for murder... You were given every opportunity to say what you wanted in the magistrates court?

Y Yes

C Why didn't you say you'd seen Andrusha herd any people to their death?

Y I think I answered all the questions put to me

C You knew the purpose of you coming here was to give evidence against Andrusha? If it is true that every time you went to buy bread you saw Andrusha herding people to their deaths why didn't you tell us?

Y I think I did.

C All you told us was that you could hear shots, but no suggestion of Andrusha being present. If it was true you would have told the court last year?

Y Yes

C You didn't tell the court, did you?

Y I don't know...

C You were read every word in the Russian?

Y Yes

C Today is the first time ever you have told this story about Andrusha?

Y Yes

C Because you want to tell the same story as everyone else?

Y Yes

C You said last year that you were frightened to go to Domachevo during the war?

Y Yes

C The truth is that you're just saying things other people have told you, aren't you?

Y I'm telling the truth

C You never saw Andrusha herding anybody toward the sand pits, did you? He wasn't present when any German officer tore off the bandage?

Y Yes the German officer was there. Andrusha knew me very well. I was frightened.

Nutting What age were you in 1942?

Yakimuk 14, 15, I don't know

N (*works it out slowly*) you were 16

Y I'm illiterate. I don't know.³³

The next witness was Ivan Baglay. He was also from Borisy, and he gave the same general background information as the other witnesses; he knew Andrusha, everyone, he said, knew Andrusha. He described the day of the main massacre: "the sound was like a

full-blown war". He described having seen the pits where the Jews were buried: "I saw blood seeping through the sand and lots of flies". He told of an incident a few days later when he saw Sawoniuk, armed, escorting a woman and her child to the police station.

B Sawoniuk carried a carbine and a pole, about 2 metres long made of birch. The woman and the child were frightened. Sawoniuk took hold of the pole with both hands and gave her a heavy blow to the right shoulder.

N Could you detect any reason why he should have hit her?

B In order to appeal himself to the *Gendarmerie*. He wanted to show that he had discovered more Jews.

N What happened to the woman.

B She fell to the ground. The child was screaming in a hoarse voice. Andrusha then put the pole back on his shoulder. He started dragging the woman, shouting "Schnell Schnell". When the woman rose, one shoulder was lower than the other and her hand was immobile. So she took the girl instead by her left hand.³⁴

Ivan Baglay also told that he saw Sawoniuk escorting the Biumen family for whom his mother had used to work sometimes.

B I saw Biumen turning to Andrusha imploring that he save the life of this family.

N Was Mrs. Biumen present?

B Yes. She was walking in front of them.

N Were their daughters there?

B They were with their mother, holding her hands.

N How old were the daughters?

B They were about 7 and 5.

N What did Andrusha's reaction appear to be?

B He didn't even want to listen. He merely forced them onwards. They continued walking in the direction of the sandhills.

N Did you ever see Mr. Biumen or any of his family again?

B No.³⁵

In the cross-examination Clegg pursued Baglay, but not very far, and in the end was satisfied to make it clear to the jury that these two stories didn't relate to any charges against Sawoniuk.

³³ 2 March 1999

³⁴ 3 March 1999

³⁵ 3 March 1999

Ivan Baglay's brother, Alexander, gave evidence. It was the father of the Baglay brothers, a carpenter, who carried out the work when Sawoniuk stole a house from the ghetto, and had it moved, and re-built elsewhere in the town. Baglay told the story that related to count one of the indictment. Of the four counts, it was by far the strongest. Baglay had witnessed Sawoniuk kill three people, he had known Sawoniuk, and he had been close to him as the murder was committed.

N Why did you go to the ghetto?

B We wanted to find something for ourselves... shoes or clothes.

N What happened?

B We were caught by the local police

N What did they do to you?

B They took us to the police station and then towards the sands.

N Was the police station opposite the ghetto gates?

B Yes

N Who took you to the sand hills?

B Andrusha. We thought that we were going to be shot. When we came out of the police station we saw three Jews. We realised that we would not be shot but would be burying them. It was about two o'clock. We went directly to the sand hills. The Jewish people had been discovered in a cellar in the ghetto.

N Was Andrusha the only policeman?

B No there were two others.

N Did Andrusha have a weapon?

B Yes

N What sort?

B A pistol.

N Were you carrying anything?

B No.

N Where did you first see the Jews?

B They were standing by a hole that had been dug out. There were three Jews, two men and one woman. Andrusha ordered them to undress. The men were about 40. They undressed. The woman, about 28, was reluctant to take her pants off. Andrusha insisted. Andrusha threatened her with a beating. The Jews were emaciated and unshaven. Andrusha shot the Jews in the back of the head. *Baglay and friend were told to bury the bodies and that they could take the clothes.*

N Who shot the Jews?

B Andrusha

N With what?

B With the pistol in the back of the head.

N Did they fall into the pit?

B Yes. One after the other.

N Where was Andrusha?

B Standing behind each³⁶

The next witness was Ivan Stepaniuk. Stepaniuk told of the death of Shlemko, which related to count 2 on the indictment. Stepaniuk had known Shlemko before the war when he had worked for him before the war in his team on the railway. Stepaniuk had seen Shlemko being taken away by Andrusha towards the massacre site a few days after the main massacre. Andrusha was beating Shlemko.

N What was Shlemko's reaction?

S He was picked up, beaten again, picked up again... The other policeman held his right arm

N For how long did they remain in your sight?

S Two to five minutes. No more.

N Where were they going to?

S Towards the woods.

N You said he was killed. What happened after you lost sight of them? Did you hear anything?

S I heard the sound of gunfire.

N When he was being hit was he doing anything to protect himself?

S No

N How did he appear.

S I can't describe him. How can I describe him?

N In what sort of spirits did he appear to be in?

S How should he feel when he was being led away to his death? He was quite insensitive.

N Can you explain ?

S He appeared to be without feeling. He was picked up, dragged on, fell down again.

N How many times did he fall when you were watching?

S About four times.

N Did you see the face of Andrusha?

S Yes I did. Every time he picked up the Jew Shlemko he would turn round so I could see his face.

N Had you seen anything like that before?

S No.

N Did you see Andrusha again that day?

S I saw him return from the woods where the shooting was.

N Did he still have the carbine?

S Yes. The carbine and the spade.

N Was Shlemko with them?

S No.

N The other policeman?

S yes.³⁷

However, under cross-examination, Stepaniuk made the following admission:

C On that day when you saw Shlemko and the two policemen, *then* you didn't know the name of either, did you?

S Yes. I didn't know him then. But I was told after it was him.

C By another policeman you described as Andrusha's brother?

S Yes

C A couple of months later?

S No a couple of days.

C The man you call Andrusha wasn't present at the conversation, was he?³⁸

Later, the Judge felt unable to allow this count to go to the jury because of the unsafe identification of Sawoniuk. In his re-examination, Stepaniuk had told how he had seen Andrusha often in Domachevo after the Shlemko incident; but under his first examination, it had appeared that his identification of Shlemko was completely based on the hearsay of the man Stepaniuk knew as Sawoniuk's brother.

The next witness that Nutting called was Detective Sergeant Griffiths from the War Crimes Unit at New Scotland Yard. On 21 March 1996 they had decided that they had enough evidence against Sawoniuk to interview him. They went to his flat at 31 Cadbury Way, London SE16. He lived alone there. He answered the door to the policemen and they introduced themselves. They had a search warrant and they searched his premises. They found 2 documents that they took away, a travel document and a photograph of Sawoniuk in a Polish army uniform.

Sawoniuk attended Southwark police station on 1 April 1996 for an interview. It was recorded by video and audio. He was represented by solicitors. The Police told him

³⁷

8 March 1999

³⁸

8 March 1999

that they were investigating charges of murder and manslaughter in the German occupied territories during 1939 and 45.

What followed in court was a bizarre piece of theatre. Nutting wanted to get the police interview before the jury and into the record. Nutting and the policeman, Griffiths 'performed' the interview, Griffiths playing himself and Nutting playing Sawoniuk. Nutting speaks very much the 'Queen's English'. He speaks slowly, deliberately, and in a self-assured way. Now, Nutting is reading Sawoniuk's words from the police interview transcript. Sawoniuk is clearly not educated and clearly not a master of English. On the other hand, he has learnt his English in Bermondsey. The words from the transcript seem like a foreigner who has learnt to speak bad cockney. Nutting says the words in his usual voice, but of course they sound ridiculous. At the time this evidence was given, it was not clear yet whether Sawoniuk was going to testify. So this reading of the transcript might have been Nutting's only opportunity to allow the jury to hear Sawoniuk's own words.

The next morning one of the jurors had been taken ill. Her doctor reports that she will be in hospital for a week. The judge decided to let her go and carry one with 11 jurors. Clegg asks that there should be no contact between the 11 jurors and the one in hospital:

Clegg: "It'd be the most natural thing in the world if they were to send her flowers, but I must ask that there be no contact"

Judge: Very well Mr. Clegg. Would you like to ask me in front of the jurors for them to have no contact?

Clegg: I'd rather that my Lord appeared to take the responsibility lest I appear unchivalrous.

*Miss Evans, the jury's usher agrees to send flowers on behalf of the jury and the court if Mr. Clegg will pay.*³⁹

³⁹

15 March 1999

As so often in this trial, the English gentility of the language and sentiments contrasted so much with the substance of the case.

Proceedings continued with the last witness for the prosecution, Fedor Zan. Zan testified that he had seen his uncle and cousins escorted to their deaths by local policemen including Sawoniuk in the Spring of 1943. This, however, did not constitute a crime under the 1991 War Crimes Act, since it was part of the 'war' against the Partisans, and not against the Jews. It might, however, be used by the defence to show that Zan had a motive to hate Sawoniuk, and therefore, possibly to lie in order to secure his conviction. On the other hand, it was further evidence to the jury of the fact that Sawoniuk was a Nazi killer.

Zan told of the incident that related to Count 3 of the indictment. He visited his sister in Kobelka, a nearby village, on his way home from work. As he was making his way there from the train station, through the woods, he heard crying and shouting. He saw a group of about 15 Jewish women undressing on the instructions of Sawoniuk. He lined them up next to a pit, and shot them with a machine gun. While in Domachevo, Zan had taken the court to the spot where he had hidden and he showed the jury the spot where he says he saw Sawoniuk shooting the women. The defence and the prosecution agreed that the distance was 127 or 128 paces. The jury had to decide whether an identification at that distance was safe. In the end they decided that it was, and found Sawoniuk guilty on this count. By the time the jury considered this count, they had reason enough to want to find Sawoniuk guilty; but an identification at such a distance and such a length of time after the event, must, surely be open to some reasonable doubt.

d) Sawoniuk under cross examination

After the presentation of the case for the prosecution, things were going fairly well for Sawoniuk. Clegg had just succeeded in having two of the four counts thrown out by the judge. It was not certain that the jury would find that the Crown had proved the remaining two counts. It is absolutely clear that Sawoniuk must have been advised by his lawyers not to testify.⁴⁰ It was his arrogance, his feeling that he knew better, that he was cleverer than the lawyers and the judge and the jury which made him testify. Perhaps it was his arrogance which in the end caused him to be convicted as much as the fact of his guilt.

Under cross examination Sawoniuk was, simply, absurd. He routinely denied everything. He denied things which he didn't need to deny; and which every witness had agreed upon; and things which were clearly established historical fact.

For example, he began by denying the existence of the ghetto in Domachevo. So Nutting asked him whether there was a ghetto in Tomashevskaya, which he also denied, and in Brest, which he also denied. He denied that there was barbed wire round the ghetto. He denied that he had ever seen Jews wearing yellow stars. He denied that there were any greater restrictions on Jews than on anyone else. He claimed that the police station was moved to a building just opposite the gate of the ghetto just by coincidence.

Sawoniuk claimed that during the main massacre, he was in visiting a friend in another village. Nutting asked him why, when he found out about the massacre, he had not decided to leave the police. His answer was

⁴⁰ When I spoke to one of his lawyers, later, they were quite happy for me to believe that this was their advice. Clearly, they were not allowed to say it directly.

I wasn't ready for that. I decided a year later. I brought myself up. I used my brain. Nobody told me nuttin.⁴¹

This was, perhaps, an echo of an argument he had had long ago with his brother about leaving the police. He was his own man. He wasn't going to be told by anyone else what was right and wrong. He would make his own decisions.

S I wasn't ready.

N You knew you could leave at any time?

S Yes.

N Some did leave?

S I wouldn't know.

N Didn't your brother leave?

S He left soon after he joined.

N Because he realised what the whole racket smelt of?

S Yes.

N I used the language that a witness used.

S My brother never discussed anything with me why he left.

N Did he leave because he was ill?

S His health wasn't good.

N Was his health an excuse?

S Yes.

N But the real reason was he didn't like what he had to do?

S He didn't want to do things like hitting people or killing people.

N What went wrong for the Jews in the six months after your brother joined to make him think that?

S He never told me. I do know he didn't like the idea that the Jews didn't have their freedom.

Judge: his answer was voluntary.

Nutting reads it out the remark about hitting and killing people:

N Those were your words?

Nutting repeats quote.

S Correct.

N Tell the jury what it was in autumn 1941 that your brother didn't like?

S Nothing whatsoever. The police were friendly. We never interfered.

Judge: This was your answer. "he did not like it what was going on in Domachevo with the Jewish" What did you mean by it. *(he repeats quote)*

What did you mean by that?

S Jew people never had their freedom.

N When did this restriction occur?

S Never. We were never told Jewish mustn't go here, go there. My brother left because the Jews never had freedom. In the German occupation they couldn't do what they wanted.

⁴¹

N What were the restrictions?

S They mustn't go far from where they lived.

N You told me this morning there were no restrictions.

S The Germans never had respect for us. We protect Domachevo from the partisans. They wasn't friendly with us.

N What were the other restrictions on the Jews?

S There were no restrictions.

N Was there any ill-treatment of the Jews?

S How should I know if they were ill. I'm not a doctor.

Nutting quotes: "Yes he, one of those persons same as myself. He didn't want to do it. Hitting people. Killing people" What alerted you and your brother to this?

S (*loudly*) Lie

N But I'm repeating your own answer. What was it that caused your brother to fear that he might have to kill Jews?

S If he'd been ordered to kill Jews he'd have done it else he'd be dead. He never discussed with me anything. He was only a half brother. We didn't have good relations.

N What you have done is to lift a corner of the truth. I suggest that what you have told us about your brother leaving the police, that your brother didn't like having to kill Jews was true.⁴²

Sometimes Sawoniuk's testimony was so bizarre and incoherent that it was not even incriminating. The one issue that made him really lose his temper was the accusation that he had been a member of the SS after he left Domachevo. He told a long and certainly fictional story about how he travelled from Domachevo to France to join the free Polish army. In fact he had travelled from Domachevo to France with the German army as a member of the Belorussian section of the SS. Nutting was able to confront him with his Polish army document but it was only of use to the prosecution if Sawoniuk could be enticed into authenticating it himself.

N Were you serving in the German army?

S I never ever joined the German army.

N We've had that document translated. What it says is 1/8 to 11/11 1944 "German army according to his own statement".

S (*angry*) Prove it me in black and white. Rubbish.

N Why does it say so?

S You are lying in front of the jury, everybody. I hope the jury doesn't believe you.

⁴²

22 March 1999

N Look at exhibit 7. Did you ever join the Waffen Border Regiment of the SS no. 76, 1st Battalion?

S (*very angry*) You call me liar twice. I call you liar.

Judge: Yes, but did you or didn't you?

S Never. Don't talk to me about German Army. I won't answer no more questions about German army.

N Were you transferred from Warsaw to France in that regiment?

S No.

N Does the document give your surname, Sawoniuk? Is that you?

N Does it give your Date of Birth?

S Yes. 7/3/21. That's correct.

N Place of Birth, Domachevo?

S Yes Sir.

N Against the German for place of birth does It say Domachevo?

S I was born in Domachevo, yes.

N Does the document say that?

S Yes. I see it.

N That is German isn't it?

S What you putting German for?

N does it say "rank" Corporal of Schuman Schukmanshaft? Were you a corporal of Schukmanshaft?

S (*Very angry, shouting*) I've listened to lies. I'm not going to listen no more.

Clegg interrupts. Pleads for a break on behalf of his client.

Judge: Mr. Nutting has the right to cross-examine.

S I don't want break.

N Could I have the document back.

S (*Shouting*) Don't show me it no more. I won't accept that. *Sawoniuk withdraws from the witness box as if he is about to leave.*

Judge (*sternly*) Listen to me. Please understand that if you are asked an improper question I will stop Mr. Nutting. So far it is not improper. Will you listen to Mr. Nutting's questions?

S I'm not prepare to answer on German army. I never been in it. I hate Germans and I hate Russians.

N Just have this document back.

S No.

Judge asks nicely

N The usher will point to the next bit I want you to look at. Does the German word mean "married to" in German?

S I don't speak German.

N Does the word after that say Nina S.?

S I don't know what S. Stands for.

N What was Nina's last name?

S I don't know. She was Russian.

N Would Nina S. refer to Nina Sawoniuk by any chance?

Silence.

N How is it that a German SS document contains your name, date of birth, place of birth and the word Nina S.?

Sawoniuk, shouting, pointing at Griffiths and the other policeman at the back of the court: He printed it!

N This is a Scotland Yard conspiracy?

S Yes. Probably.

N All part of the KGB conspiracy?

S They work together innit?

N Are you tired Mr. Sawoniuk.

S I'm tired enough of you!

Judge: We'll have a break now.⁴³

Sawoniuk lied about almost everything under cross examination but nearly all of the things he lied about were not centrally important to the counts with which he was charged. Did he kill the 16 women in the Forest as Zan said, and did he kill the 3 Jews and force Baglay to bury the bodies? These were the only crucial questions. It may have been true, that, if Sawoniuk had been charged with the crime of genocide, or crimes against humanity, then the court would have been able more easily to take into account the whole story which emerged about Sawoniuk's conduct during the war. It would not have been necessary to focus exclusively on the two murders. It would have been possible to take into consideration other evidence which added to the picture of Sawoniuk as a Nazi killer. And perhaps, even if it had proved impossible to prove the two specific murders, it still might have been possible to convict him of being part of the common plan or criminal conspiracy to kill the Jews of Europe. But in England, the charge was simply murder, and so the two particular counts were all important.

Clegg's closing speech was interesting and surprisingly compelling. He noticed that all of the important witnesses, all of the witnesses who testified to having seen Sawoniuk committing atrocities, came from Borisy. All of the witnesses who came from Domachevo itself, while providing background information did not tell of having seen

Sawoniuk actually commit any crimes. But every single person from Borisy who was alive during the war, said Clegg, and who is still alive today, gave evidence of particular crimes carried out by Andrusha.⁴⁴ Clegg argued that this was too much of a coincidence. Therefore, there must have been either some sort of Borisy conspiracy, or some sort of communal action which was based on the Borisy collective memory or gossip of war time and of Andrusha's involvement. And he gives a reason why Sawoniuk would be particularly hated in Borisy, a hamlet consisting of no more than 30 houses. Borisy was a partisan village, and Sawoniuk freely admitted to having killed partisans. He even recalled the incident where Zan's uncle and aunt and cousins were killed. Also, Clegg pointed out that Yakimuk, Melaniuk, and Alexander Baglay didn't mention important parts of the stories they told about Andrusha in court, at the time of the first British police interviews, so they told new and important information only when they knew who the suspect was. And further still, there was much media interest in Domachevo concerning Sawoniuk, and much talk about Sawoniuk's guilt. Zan had given interviews to both British and Russian television journalists about Sawoniuk. It is certainly possible that by the time of the trial, it was 'well known' in Borisy as well as Domachevo, that Sawoniuk was guilty, and that it was important for him to be found guilty.

It might, however, be true that the jury had already tacitly agreed upon their verdicts before Clegg's closing address but after Nutting's, since it was this lunchtime that they were all seen for the first time in the pub across the road from the Old Bailey enjoying lunchtime pints of beer.

⁴³

22 March 1999

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This, Clegg admitted, at Sawoniuk's appeal, was a little, but not much of an exaggeration.

The jury were certainly convinced of the general guilt of Andrei Sawoniuk, and the two counts, based on the evidence of Alexander Baglay and Fedor Zan enabled them to convict him, which they did. Since he was found guilty of murder, he was sentenced, and the judge had no discretion, to life imprisonment.

The trial of Sawoniuk was a cosmopolitan trial. It dealt with events in Belorus, organised by German Nazis as part of their attempt to kill the Jews and take over the world. Perhaps, then, it would have been most appropriate to have held the trial in an international criminal court, and for the defendant to have been charged with crimes against humanity. In the absence of the existence of such a court, the trial was held in London under British law and so took a transitional form between national and cosmopolitan.

The court dealt with evidence which was 56 years old, which had been compromised by fading memories, by the telling and re-telling of stories, by the cross-contamination of evidence, and by the re-configuration of old enmities. The particular form of evidence which was demanded by English law was quite specific, that of immediate oral testimony, subjected to cross-examination. Other forms, which may have shed light on the case, such as documentary evidence, were excluded. Evidence was offered in the form of Holocaust memoir and of nationalistic narrative which was aggressively transformed by the processes of the court into its preferred forms.

A complex picture of Andrei Sawoniuk emerged from the process. The contrast of ordinariness and extra-ordinariness in his story was striking. The story was one of a dialectical interplay between structure and agency. Sawoniuk would certainly not have become a killer if he had not found himself in a situation where killing was expected and

sanctioned by authority, yet neither was he forced into it. Some aspects of Sawoniuk's transformation into a mass killer are in tune with Bauman's framework, but others are in contradiction with it. It is true that, believing the Nazis were destined to win the war, his strategy of becoming a policeman and behaving in such a way as to be trusted and promoted by the occupying power had a certain logic to it from the point of view of his own narrow self-interest. It gave him a job, a living, power and the possibility of promotion. But it is stretching the facts to suggest that Sawoniuk's decision to become a *genocidaire* was simply an example of rational decision-making. Firstly, since his brother chose to leave the police force and is still living quite happily just across the river from Domachevo, it is clear that Sawoniuk could have made the same choice if he had wanted to. He chose a different course, and it was a free and conscious decision. He had an argument with his brother; he chose to kill Jews and his brother chose to take his chances outside the police force. Secondly, a decision such as whether or not to become a mass killer must involve factors other than rational choice. It is only possible to speculate about Sawoniuk's early life and what kind of a person he was when he chose to become a killer. It is clear enough that he was not brought up in a loving family and that he was poor. It also seems that he suffered as a child from some bullying. None of this, of course, can explain a person becoming a brutal mass murderer, but it is not irrelevant that he was an excluded, alienated, unloved young man. He found a way to improve his social prospects and also, perhaps, an outlet for his anger. But Sawoniuk was in no way a Weberian bureaucrat, who just obeyed orders and carried out professional duties. He chose to become a killer and he chose to kill and beat with more brutality than the efficient pursuit of a bureaucratic goal could possibly require.

Chapter 7

IRVING V LIPSTADT: THE LEGAL CONSTRUCTION OF AUTHORITATIVE COSMOPOLITAN NARRATIVE¹

a) Irving v Lipstadt

The Irving v Lipstadt libel trial was a different kind of trial from the criminal trials examined so far. It was centrally concerned with assessing the parameters, rules and norms of academic historiographical methodology. It was asked to decide whether the work of David Irving, which questions and denies central facts about the Holocaust, fell within or without those parameters: at least whether someone who says that he is a Holocaust denier rather than a historian should be stopped by the law from publishing. Inevitably, this decision necessitated some investigation into the actual events in question as well as into the accuracy, limits and legitimacy of the historiography which has mapped them. Thus, the trial was judging the events of a particular set of crimes against humanity in a different way from in a criminal trial. Instead of asking whether a particular defendant shared a legal responsibility for them, it was asked to make a judgement about the two different forms of narrative which claimed to chart them: the academic form of Deborah Lipstadt and the neo-Nazi form of David Irving. This court was being asked to produce a form of narrative of its own. Two forms of narrative were given to the court as inputs; an academic form and a neo-Nazi form. The court had to produce a cosmopolitan and legally authoritative output by working on those inputs according to its own procedures, rules and norms. Even though the court was a national and not a cosmopolitan one, its task was to give an impartial, that is. not nationally

particularistic, verdict regarding a profoundly supra-national event. The judgement consisted of a three hundred page document which sketched the central events and facts of the Holocaust, and showed how Irving's writing could not be rightly understood as even an eccentric or dissident attempt at honest historiography. The judgement was a cosmopolitan narrative.

I was in the queue outside the courtroom where the case was being heard. A man behind me was explaining the issues very loudly to his companion. "Why doesn't Irving have the balls to tell the truth?" he asked.

He knows as well as we do that no Jews were ever killed, there were no gas chambers. So why does he admit that *some* existed but not others? He's just trying to please the judge. But we all know that he's made his mind up already. All they have to do is go to Auschwitz, dig up the rubble, and find that there's no holes in the roof.² Then they'd know there were no gas chambers. But they won't do it. Because then the whole game would be up...

I have turned round to watch and listen. I don't know what to do. Should I attack him? Argue with him? I just continue to watch and listen, keeping eye contact with him. He enjoys the attention. His self-righteous little monologue puffs up, becoming louder and more confident. He is aware that he has an audience to shock. He covers many important issues; the flood of asylum seekers; the weakness and hypocrisy of the Labour Government; 'if "they" continue to come over here, then perhaps I'll leave the country.' I, and those near me in the queue, listened for about five minutes, until the courtroom was opened and we were allowed to file in, making every effort not to have to sit next to the Nazi for the entire morning.³

¹ This account is based on my own observation and notes of the trial. For a recent account of the trial, see **Guttenplan, D.D.** (2001) *The Holocaust on Trial*, London, Granta.

² The holes he meant were the ones through which the gas was introduced.

³ Taylor says that "On most days, assembled at the back of the courtroom were a motley crew of Irving supporters. At least three were known members of the BNP, Bob Gertner, Arthur Flinders

The Irving case was in some ways, more unpleasant and shocking to observe than the crimes against humanity trials. There were always a sprinkling of Nazis in the audience, ready to laugh at Irving's witticisms and marvel at his cleverness. Irving himself was not being asked to answer for any Nazi crimes in court. On the contrary, his performance in court actually constituted his Nazi political activity. We were not observing the consequences of his activity, but the activity itself of a Nazi intellectual.

Deborah Lipstadt published her book, *Denying the Holocaust: The Growing Assault on Truth and Memory* in 1993. It was an academic study which sought to expose the methods, strategies and political agendas of those who deny the Holocaust. It mentioned David Irving sixteen times. She called Irving "one of the most dangerous" of men who call themselves "revisionists". "Familiar with historical evidence," she wrote, "he bends it until it conforms with his ideological leanings and political agenda."⁴

Irving sued Lipstadt and Penguin Books for libel but he presented himself as a victim. In court he was alone. He represented himself. On the other side of the room was Barrister Richard Rampton and the late Princess Diana's divorce lawyer, Anthony Julius, accompanied by a team of about ten busy, scurrying, young lawyers; they were able to elicit the testimony of five well known academics, backed up by long reports prepared with the help of their research assistants; they had the financial backing of the Penguin corporation. Outside the courtroom was the entire world Jewish conspiracy trying to silence Irving. But the truth, which sometimes the commentators on the trial overlooked, was that it was Irving who was trying to silence Lipstadt; it was he who

and Ron Smith" I don't know if 'my' Nazi was one of these. Taylor, K. (2000). 'Irving in denial: the trial'. in *Holocaust Denial: The David Irving trial and international revisionism*. K. Taylor (Ed). London, Searchlight Educational Trust

instigated the trial; it was she who was forced to spend five years of her life defending her right to publish. It was David Irving who had nothing to lose.

At the beginning of the trial it was agreed by both sides, and Judge Charles Gray, that there would be no jury. Anthony Julius explained later⁵ that the Lipstadt side's motivation for agreeing to this was that it would simplify and shorten the trial. He denied that they would have been more worried about the outcome of the case had it been tried by a jury. He also argued, that with hindsight, the greatest benefit of having no jury was that the judge produced a large, comprehensive and closely argued written judgement which vindicated Lipstadt in detail, and which also concluded that Irving was a liar motivated by racism. A jury would only have been able to produce a guilty or not-guilty judgement.

Julius also explained why they never called eye-witnesses of the Holocaust to give evidence against Irving. Some survivors had been unhappy at this decision. They had argued that they spoke with a unique authority and that they felt marginalised because they were not allowed to be central in re-butting Irving's case themselves. Julius argued that the Lipstadt legal team had a moral objection; they did not want to expose survivors to days of cross examination by the "belligerent antisemite". They also had a forensic objection: they wanted to run the case as if it was their case, to try to take the initiative in the trial. They wanted to show that Irving was corrupt; that his 'history' was full of lies and distortions. The best way to do this, they decided, was to call historians to speak for the historical documents. They wanted to put Irving on the defensive, to "run

Lipstadt, D. (1993). *Denying the Holocaust: the growing assault on truth and memory*. Harmondsworth, Penguin.

⁵ Address given by Anthony Julius (2000) at *After The Trial*, a seminar organised by the Wiener Library at Birkbeck College, 25 June, 2000.

the case like a history seminar with Irving as a rather bad student.”⁶ Lipstadt, too, did not give evidence. Her team felt that her evidence was in her book. They wanted to focus the case on Irving and his books not on Lipstadt.

In the case Irving denied three central things: that Jews were killed in gas chambers at Auschwitz, that Hitler directly ordered their slaughter, and that there was any systematic plan to destroy European Jewry.

Irving claimed that the well known pictures of bodies taken in concentration camps are victims of typhus, of death by “natural causes”. Why were they all so thin, he asks, if Jews were taken straight off the trains and killed? He boasted that Auschwitz was the “flagship” of the Holocaust legend; if that were sunk, and it would be within six weeks, then the whole legend would crumble. In this case *Auschwitz* became a substitute for the whole genocide; and the gas chamber *Birkenau II* became a substitute for Auschwitz.

The first expert witness for Lipstadt, was, therefore, Robert Jan Van Pelt, an architectural historian who has done some of the most interesting and authoritative research on Auschwitz. He spent a number of years in the archives at Auschwitz, reconstructing the architectural history of the camp and particularly of the gas chambers.

Van Pelt’s report said that the overwhelming evidence shows that a million Jews were murdered at Auschwitz. He says that the convergence of testimony made it a “moral certainty” that the gas chambers were the main instrument of murder between summer 1942 and 1944. Eyewitness evidence had been given by prisoners including Stanislaw Jankowski, Shlomo Dragon and Henryk Tauber on gassings in the five crematoriums. Others had given evidence of how the gas chambers were demolished in

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Julius (2000)

late 1944 and January 1945 to destroy evidence. There were also confessions by Nazis, Pery Broad, and SS officer, Rudolf Hoss, Adolf Eichmann and more.

Irving's position was that eye witness accounts by Jewish witnesses are either in need of "psychiatric evaluation", or are concocted by the world Jewish conspiracy, or are accounts of other accounts, or infected by other well known accounts. German eye witness accounts which admit the existence of gas chambers are extracted by allied torture after the war.

One of Irving's 'theories' was that the gas chambers were in fact air raid shelters for the SS. Van Pelt showed that the gas chambers would have been very impractical air raid shelters: they were one and a half miles from the SS barrack. Van Pelt showed his slides in the court: he pointed out the undressing room, the Zyklon B insertion columns, the dissection room, and the chimneys of the crematorium. He told the story of the ways in which the buildings, which had originally been built as real, honest, crematoria were re-adapted and re-designed into gas chambers; he showed plans which detailed the modifications which were necessary, stage by stage, to convert innocent crematoria into gas chambers. Van Pelt showed enlarged war time negatives of the gas chambers which had been taken by Allied bombers; Irving examined the photographs closely, and said he could see no holes in the roof. Van Pelt had already obtained scientific evidence from photographic experts which said that the dots on the pictures could well be holes in the roof. Irving argued that there were no holes, and therefore, no gas could have been introduced into the chambers. "If the Auschwitz authorities were to agree to allow the rubble to be cleaned away and the holes were to be found in the concrete, I would tomorrow halt my case," was Irving's hollow boast.

Irving had first been converted to Holocaust denial by the report offered by Fred Leuchter at the trial of Ernst Zundel, in the early 1991, who was on trial in Canada for the crime of Holocaust denial.

Leuchter was a designer of execution equipment in the USA. He had been asked by the Zundel defence to prepare an expert report on the gas chambers at Auschwitz. Even though he was no expert, he went to Auschwitz, secretly chiselled small holes all over the remains of the gas chambers, and submitted the samples for chemical analysis. He says that they recorded only very small traces of cyanide in the gas chamber remains and relatively large traces in the delousing chamber remains; therefore the gas chambers were never in fact gas chambers. "The report was flawed rubbish" said Rampton, Lipstadt's barrister. "It was pioneering work, even though it has been superseded. Leuchter was barking up the right tree," said Irving. Van Pelt said that the residues were different in the different types of gas chambers due to differences of heat and humidity levels when gassing people and clothing. The Leuchter report was, indeed, an amateurish report produced by a man with no expertise, either historical or forensic. Irving admitted that it was fatally flawed, but still insisted that Leuchter was right in his conclusions, nevertheless.

In his cross-examination, Irving grilled Van Pelt on one document in particular, questioning its authenticity. He rattled off questions: about a serial number out of sequence, an incorrect rank for the signing officer, the initials of the typist (which Irving said exist on no other document), even the precise location of the margin. All these discrepancies, bragged Irving, suggested a forgery. "This is where Irving is happiest, rolling around in swastika-embossed paper. He knows their mannerisms. On this terrain,

Irving can be frighteningly convincing.”⁷ In fact, after two day’s research, Van Pelt was able to authenticate the document, and to give satisfactory explanations for Irving’s anomalies.

One of the strategies of the defence was to present documents which Irving had deliberately ignored, which showed things which Irving wished to deny. He responded either by calling them forgeries, or claiming he has never seen them, and therefore could not be guilty of distorting them. This was not fundamentally a trial about the truth of the historical account of the Holocaust; it was a trial about David Irving’s distortion. Thus Irving had to deny having read books which he owns, and even ones that he has commented on in public if they contain evidence that he claims never to have known about.

The other expert reports produced by the defence were written by Chris Browning, by Peter Longerich, which detailed evidence concerning the Holocaust outside of Auschwitz, by Jaho Funke, which examined Irving’s contemporary links with neo-Nazis in Germany and by Richard Evans, which examined Irving’s historiographical methodology.

Browning said that the total number of Jewish victims in the Holocaust is between five and six million. A good approximation could be made for the numbers from Poland and westwards but there is more uncertainty about the figure in the Soviet Union, since records, both Russian records pre-war and Nazi records during the war were not as accurate as in Europe. Irving spent much time in cross examination of Browning trying to dispute these figures.

⁷ Freedland, J. (2000). ‘Court 73 - where history is on trial’. *The Guardian*. London, 05/02/2000

Irving tried to suggest to Browning that the Madagascar plan, the plan to send all the Jews from the Reich to Madagascar, might have been a good one. Browning argued that it could have been attempted only if the British had been defeated, so that the Nazis could use shipping safely. Anyway, argued Browning, it was only ever a bizarre fantasy, that the results would have been disastrous and that a large percentage of the people would have perished in an SS run state. Irving replied “I think the Jews are a very sturdy people.”

Irving argued that there had been no explicit reference to killing at the Wannsee conference. Browning argued that there were a number of passages whose meaning was viewed by most people as “transparent”.

Evans was not a Holocaust specialist, but a specialist in history and historiographical methodology. Evans claims that he began the investigation into Irving’s work with an open mind. He was paid by the hour, he said, and not for his conclusions.⁸ Irving based his books on primary sources; he is proud not to rely on the work of other historians. On a first reading, said Evans, Irving’s books appear entirely plausible. However, he and his research students had carried out a most detailed and painstaking investigation into Irving’s sources. They followed up each reference, found the documents to which they referred, and checked them. Evans found that every piece of Irving’s work that they examined in this way, not just those which referred to the Holocaust, but others which they examined as a control, turned out to be a “tissue of small manipulations” rendering his entire output “absolutely worthless”. An example Evans gave was drawn from Irving’s account of the main trial at Nuremberg. Irving

⁸ Address given by **Richard Evans**, at *After the Trial* a seminar organised by the Wiener Library at Birkbeck College, 25 June, 2000.

claimed that Biddle, a judge at Nuremberg, had commented about a witness in his diary. “All this I do not believe”. So in Irving’s work, all the testimony of this witness was invalidated. When the reference was checked by Evans, he found that the truth was that Biddle had in fact said “this I do not believe” clearly referring to a particular piece of the witness’ testimony, and emphatically not to the rest, which he certainly did believe. Irving had inserted one word, “all” and changed the entire meaning of the original.

Evans concluded that Irving’s methodology was informed by the fact that he already knows the real truth about events; given this fact, the documents may be manipulated a little in order that they should show the true picture.

After the trial, Evans presented an interesting point of view in relation to the often repeated argument in the press that a courtroom is no place to be discussing and judging academic debate. Evans said that in fact, the rules and facilities of the courtroom were very helpful. In court, time was unlimited. If Evans wanted to dispute the meaning of the precise placing of a full stop in a document, for example, with Irving, then he could do it; and he could do it for hours, until he had made his point. This, Evans, remarked, wasn’t always possible in an academic seminar. Also, he said, the transcribing process in the court was invaluable. It created an accurate record of what had been said. If someone claimed they had not said something that they had in fact said, if they changed their story subtly, then this could easily be shown in the transcript. The court had resources of time, people and money which are not usually available to academics.

In summary, Evans’ conclusion was that Irving’s work could not be considered as history because it consistently asserted things which the documents did not allow as possibilities. There is vast space for debate and disagreement within the parameters of

what the historical evidence allows as possibilities; but Irving was not at all constrained by the documents that he knew so well.

The defence spent some time showing Irving's motivation. Evans, Browning and Van Pelt had shown how he consistently lied about the historical evidence; the defence showed that the reason he did this was that he was a racist and a Nazi. His political project was to deny that the Nazis carried out the genocide, and to deny, in particular, that Hitler carried out a genocide. This is the first step in the rehabilitation of the *fürher* and of his ideas. The defence found many examples of Irving's racism. One of the most striking perhaps was from a passage in Irving's diary in which he says that he sings a rhyme to his baby daughter Jessica (9 months) when "half-breed" children were wheeled past them in their prams:

I am a baby Aryan
Not Jewish or sectarian
I have no plans to marry an
Ape or Rastafarian.

Another example of Irving's racism was gleaned from a transcript of a speech that he had made to his friends in the 'Clarendon Club'. He regretted that news readers at the BBC no longer wore evening jackets when they read the news. He suggested that on the BBC in future, a newsreader in a dinner jacket should read the serious news, then a lady should read the less important news, the gossip about show biz and so on, then Trevor McDonald⁹ should present the latest news about muggings and drug busts. "I wish I could go to Heathrow and get on a plane and land back in England as it was when I was born in 1938," he mused in a speech. He feels "queasy" because there are black cricketers in the England team

I was speaking about what a pity it is we have to have blacks on the team and they are better than our whites. I say it's a pity because I am English...I call it patriotism... patriotism is pride in a country that has been handed to you by your fathers. I don't think there is anything despicable or disreputable about patriotism....

The defence spent two days at the trial cross-examining Irving over his racist speeches and writings. Irving laughed it all off as fun, or as patriotism.

One of the most telling pieces of evidence against Irving was a video recording of a speech that Irving made in Tampa, Florida in October 1995. It was organised by the National Alliance, an American Nazi group. Jaho Funke testified that Irving had spoken at eight of their events between 1990 and 1998. Irving denied knowing who had organised the meeting, even though there was a very large National Alliance symbol visible close to him and the meeting had been introduced by a man who welcomed the audience to the National Alliance event. The speech contained many unpleasant examples of Holocaust denial, racism and antisemitism. But the recording of the speech also showed, quite clearly, that David Irving considers himself to be part of the movement. He uses the word "we" often. *We* are making progress; *we* are beginning to cast doubt on the Holocaust legend; *we* are engaged in heroic struggle for truth. Irving was speaking to his comrades.

Funke, from the Free University of Berlin, a political scientist, wrote a 140 page report for the defence about Irving's links with neo Nazis in Germany. Using video clips of footage of Irving speaking in German at far right events, Funke identified an assortment of leading extremists and neo Nazis who had also been present. Skinheads in boots were shown marching to a rally in Halle in 1991, where Irving was one of the speakers. When he spoke they were heard to shout "Sieg Heil". 'Did you see me put my

hand up to tell them to stop?’ Irving queried. He went on to suggest that he had been “shocked” by some of his audience “Did you get the impression that I was overjoyed?” he asked “Was I happy?” You knew the character of the event, Funke retorted.

Funke’s report said that Irving had strong and consistent connections with many [German] neo-Nazi organisations between 1990 and 93. Some groups were subsequently banned for inciting racial hatred. “How could I have anticipated ... that they would be banned? “As an intelligent man who knows German, you could have known” replied the Funke.

Funke told the court that Irving had said at a press conference in Berlin that “it is a defamation of the German people if one talks of extermination camps or death camps”. Irving said he was mis-quoted. Funke said that “Mr. Irving committed himself wholeheartedly to the cause of revisionism, and thus neo-Nazism, in Germany. For ten years until he was banned from Germany in 1993, he was in a political alliance with the German People’s Union, an anti semitic party, and its leader Gerhard Frey.

Irving denied joining a toast to a “certain statesman” to mark what would have been his 101st Birthday at a 1990 Munich dinner. “I had no glass as I don’t drink. If one has no glass and one doesn’t drink, how can one toast?” An excellent example of the arrogance of Irving; he uses this child’s logical trick, and assumes that everyone is forced, against their will, to the conclusion that nothing can be proved against him.

Irving claimed in the case that many Jews died while working and were not murdered; he asked why there were doctors and hospitals at Auschwitz if it was an extermination camp. Peter Longerich replied that the policy of “extermination through work” was illustrated by the “Death audits” maintained by the camp authorities. The

duty of Nazi doctors was not to keep inmates alive but to maintain their effectiveness as a workforce as high as possible.

Speaking later¹⁰, Anthony Julius downplayed the importance of the Irving case; no new knowledge or insight came out of it; his side didn't want the case to happen at all; it was important only to Irving's side. Therefore the case would have been very important if Irving had won it. Julius also argued that the written judgement, a 334 page document, because of its clarity, detail and authority gave the case some importance. From his point of view, something good came out of the case in the end. What he felt had been achieved was this newly authoritative narrative which gave the truth of the events of the Holocaust and of David Irving's distortions to the world and to future generations.¹¹

¹⁰ Julius (2000)l

¹¹ There was a strange parallel to the Lipstadt v. Irving case being heard in the same building at the same time. Independent Television News (ITN) was suing *Living Marxism*, a magazine, for libel. *Living Marxism* had published an article about the breaking of the story of Omarska and Trnopolje in the western news media. ITN journalist Penny Marshall and her cameraman, Jeremy Irvin, accompanied by Channel Four journalist Ian Williams and Ed Vulliamy from the *Guardian*, had been the first journalists to see and report on the camps. The journalists had shot some videotape on the 5th August 1992 from which was reproduced a well known picture which showed an emaciated Muslim prisoner at Trnopolje, called Fikret Alic, behind a barbed wire fence. The media made much of this picture because of its obvious similarities to images of emaciated prisoners from Nazi concentration camps behind barbed wire. "The barbed wire in the picture is not around the Bosnian Muslims; it is around the cameraman and the journalists", wrote Thomas Deichmann in *Living Marxism*. (Thomas Deichmann, [1997] http://www.informinc.co.uk/ITN-vs-LM/story/LM97_Bosnia.html) The article went on to argue that the picture and the account of the camps had been invented by the journalists in order to propagate the myth of Serbian concentration camps in Bosnia. This case of left-wing 'denial' of the Serbian campaign of ethnic cleansing and terror was much shorter and simpler than the Irving case, and received much less publicity. ITN and the journalists wanted to defend their reputations, and they wanted to defend the truth of their 'scoop'. Their story, indeed, had been a profoundly important one for the public understanding of the war and for public pressure on the UN. The case was heard before a jury and was won by the journalists. The damages which were awarded bankrupted *Living Marxism*.

b) Towards a Global Social Memory

If the cosmopolitan project is to have successes then some of the mythology which underpins the ideologies of nationalism must be undercut. These mythologies of nationalism are produced and re-produced through the telling and re-telling of particular national narratives and through the suppression of others. English nationalists, for example, are much happier telling themselves stories about surviving Viking and Norman invasions and victory in two world wars than they are about the bloody suppression and racist exploitation of the inhabitants of their former colonies. Some stories are distorted into glorious myth, while others are quietly forgotten. One institution of the nation-state which plays a part in producing and re-producing myths of nationhood is the legal system. Every trial is a drama, a story; each has a *dénouement* where the judge pronounces the verdict, the judgement, the truth. The truth which the judge pronounces is a national truth. The citizens must be protected from this dangerous criminal; the publication of that official document is not in the national interest; this strike is unconstitutional; that publication is obscene. Courts themselves play a significant role in the production of narratives which define the nation. The narratives which they produce are official narratives; they carry extra weight because they have at their disposal certain state resources and powers. So what kind of narratives do cosmopolitan courts produce and reproduce? I will argue that an important part of their function is to produce cosmopolitan narratives of exactly the type which can play their part in undercutting myths of nationhood. There are, of course, many other sources of cosmopolitan narrative as there are other sources of myths of nation; yet cosmopolitan courts also speak with a certain authority. It is an authority which is derived from their foundations in universal

human rights discourses and internationally agreed rules and norms. Cosmopolitan courts have a particular role in mediating between the claims of competing nationalisms which renders them particularly well suited to the production of authoritative cosmopolitan narrative.

Nationalism, as Gellner¹² has argued, is a doctrine which holds that the nation-state is the natural unit of political and social organisation. The term *nation-state* is notoriously difficult to define. It is based on the idea that people are naturally divided into nations and that these nations achieve self-determination, self-rule, through their own sets of political structures, their own states. There have been many attempts to define the *nation* in terms of sets of criteria. For example, Stalin's 1912 definition:

A nation is a historically evolved, stable community of language, territory, economic life and psychological make-up manifested in a community of culture.¹³

Yet these criteria are "fuzzy, shifting and ambiguous"¹⁴ and we can all think of examples of 'nations' which lack one or more of these criteria. This difficulty of defining the objective existence of the referent of the world 'nation' focuses attention back onto nationalism as an ideology and onto the nation-state.

There is agreement in the sociological writing on nationalism that nations and nation states are modern phenomena, no more than one or two hundred years old; this finding is of course starkly at odds with the claim of all nationalisms to be age old communities which stretch back into the mists of time. Moreover *nations* are more the creation of *states* than the other way round: the emergence of groups of people who feel a

¹² Gellner, E. (1983). *Nations and Nationalism*. Oxford, Blackwell.

¹³ Cited in Hobsbawm, E. J. (1995). *Nations and Nationalism since 1780: Programme, Myth, Reality*. Cambridge, Cambridge University Press. p. 5

¹⁴ Hobsbawm, E. J. (1995)

national belonging with each other was in fact the result of, not the cause of, the development of the modern state.

Benedict Anderson's¹⁵ anthropological approach to the question emphasises the fact that the nation state is bound together by the telling and re-telling of myth. The use of the term myth in this context highlights the sacred or pseudo-sacred nature of the narrative. They are narratives which particular people, by particular social action, have succeeded in imbuing with that sacred quality. Nations are imagined communities firstly because they are based on narratives of foundation and of common history and secondly because they are so large that the relationship of one citizen with another can only be mediated by ritual, printed communication and latterly through the mass media. A nation forges an identity through telling itself stories. Stories give a sense of direction and continuity and therefore identity and community.

Given that nation states are the ubiquitous form of political community in our time and that nationalism relies heavily on the creation of myths of nationhood, it is not surprising that much of the sociological writing about social memory highlights its nationalistic character. Narratives of nationhood are one of the pillars upon which nation states are built and maintained. While the narratives speak of timeless community, stretching back into the mists of history, the narratives themselves, like the nations they constitute, are much more flexible than they appear. Which narratives are to be told; which narratives are to be accepted as national truth; these are questions of the utmost political importance. In Britain, for example, there is always political controversy about how history and religion are taught in schools; how are narratives of nationhood to be taught to the next generation?

Norman Cigar¹⁶ argues that the processes of narrative creation occurred very quickly in the former Yugoslavia at the end of the 1980's. It was the conscious strategy of the nationalists to create and re-create ancient myths of nationhood, to re-write and re-tell the glorious history of Serbia or of Croatia. Cigar argues that, contrary to the widely accepted myths which so quickly came to be common sense, in the late 1980's, "Islamic-Christian coexistence, not genocide against the Serbs, was the rule during the five hundred years of Ottoman presence."¹⁷ In the 1980's the Serbian nationalists brought the myth of heroic Serbian martyrdom to the fore. Serbia had been the victim of many centuries of Islamic domination. The idea of a Greater Serbia, as the only way for Serbs to avoid continuing domination, had been a core idea of the Serbian nationalists since the 19th century. Now, the Serbian nationalists were on the rise, and an important part of their work was to imbue Serbs with a particular narrative of their past. In 1986 the Serbian Academy of Arts and Sciences, which was an organisation of Serbia's leading intellectuals, produced the 'Serbian Memorandum' which argued that the Serbian people had been denied their destiny of a Greater Serbia following the second world war by the communists; Greater Serbia was a democratic right, and was the only political programme for freedom. The Serbian nationalists wove narratives of ancient victories and defeats, of Ottoman, therefore, Turkish, Muslim, domination. In 1989, Milosevic went to Kosovo, and with much rhetoric concerning the battle of Kosovo of 1389, 500 years earlier, he proclaimed the end of Kosovar domination over the Serbs. Similarly, the nationalists focused on remembrance of the pro Nazi Croatian Ustasha atrocities during

¹⁵ Anderson, B. (1995). *Imagined Communities*. London, Verso.

¹⁶ Cigar, N. (1995). *Genocide in Bosnia - the Policy of "Ethnic Cleansing"*. College Station, Texas A&M University Press.

¹⁷ Cigar (1995) p. 12.

the second world war. The wars in the former Yugoslavia have often been presented in the western media as the result of age old conflict in the Balkans. Yet, as Cigar shows, it was in fact a conscious re-configuration and re-popularisation of the narratives of age old conflict in the late 1980's by the nationalists which helped to energise the people for the wars of conquest and ethnic cleansing. Timeless myth can be changed very quickly by purposive political action. The popularisation of particular social memories is central to the political work of nationalists.

Crimes against humanity, ethnic cleansing, and genocide are inevitably preceded by this political work of creating and consolidating timeless narratives. They may be more nationalistic, like in Serbia and Croatia, or hybrids of nationalism with supra-national ideologies, like those in Nazi Germany or Stalinist Russia. How can these genocidal and mythical social memories be replaced, fought against, or superceded?

In this thesis I have been surveying a facet of the emergence of a new cosmopolitan legal order. There is emerging a body of law and a set of institutions which is becoming able to try those responsible for criminal violations of human rights, crimes against humanity, ethnic cleansing and genocide. Such trials are important in themselves, in order to hold to account those who commit the greatest crimes, and to deter others from committing them. But in order to do this, a trial has first to establish the true picture of the events under investigation. This function of finding truth is a particularly important one in the field of crimes against humanity trials. One of the central purposes of the Nuremberg tribunals was to publicise the truth about what the Nazis had done: similarly the ICTY aims to show clearly what the nature of genocide and ethnic cleansing was. The Tadic judgement is a long and closely argued document showing how the war

started in Bosnia, how the politics of the communities evolved, how ethnic cleansing and genocide was possible, how it was carried out, and who was responsible. Tadic could have been safely dispatched to prison after a few of weeks in court; but the trial was about more than Tadic. It was about producing a version of the truth of what happened; a version which claims authority because it is produced by an impartial, cosmopolitan court according to the rules, methods and traditions of law. There are many ways of producing truth; journalism, art, memoir, historiography, religion, science, astrology. All have their own rules, methods and traditions. Legal processes of finding truth claim a particular authority since they have the right to impose sanctions on those who are found guilty. Their decisions are implemented by the use or threat of legally legitimate violence. The process which we can see happening in the evolution of cosmopolitan law is also in part a process of the development of a cosmopolitan social collective memory. Courts receive particular and contradictory testimony; they act upon this according to their own rules and produce a single truth. Cosmopolitan courts receive nationally particularistic narratives as testimony which they transform into an authoritative cosmopolitan social memory.

The Sawoniuk trial demonstrates this process very clearly. The narratives which the witnesses brought to the court were all heavily influenced by their own national social memories. The subject matter which was under investigation by the court, the Holocaust and the second world war, are centrally important to national myths of nationhood. Israel, Belorus, Poland, Britain, Germany, USSR and Russia; all the nation-states involved in the trial have different tellings of the story of the war and the Holocaust and these tellings are central to their national collective identities. They are central to the

ways in which those nations produce and re-produce their national identities. To have an identity is to have a story; a story which gives a sense of direction and a sense of continuity. The way a nation which was involved in these events understands its role in the second world war and the Holocaust is one of the most crucial determinants of its national identity. These stories have been told and developed for 56 years before the trial; and then the witnesses, imbued with their own national versions of the big picture, came to court to give evidence on matters intimately connected to central myths of their own nationhood.

When Blustein tells his personal story he is also telling the founding myth of the state of Israel. His childhood was spent in an uneasy co-existence with the majority community which tolerated him but was always liable to intolerance; his family and almost every Jew he knew were murdered by the invaders with the complicity of that majority community; by a combination of great toughness, good luck, bravery, stubbornness, guile and intelligence he managed to survive the genocide. After the genocide Blustein was one of those pioneers who built a homeland where Jews could be genuinely free, make the desert bloom, etc. etc.

Sawoniuk was born in poor but proud Poland. During his childhood it was invaded first by the USSR; they closed down all private businesses and shops; they caused Sawoniuk, and Poland, increased hardship and hunger; and in place of food or prosperity they provided party men and propaganda. The Germans invaded briefly in 1939, only to withdraw from that part of Poland and allow the Russians to re-occupy. They invaded again after two years of terrible poverty and terror under Stalinist rule. Poland was a play-thing in the hands of the Great Powers across its borders. Sawoniuk

joined the police in order to protect his town and his country from communist and Jewish enemies who wanted to kill, exploit and enslave ordinary people like himself; who in fact killed his first wife in the raid on the police station. Sawoniuk's story was prevented from becoming central to the official collective memory of Poland because of the military defeat of the Nazis; it was prevented partly by the Nuremberg tribunals themselves, and by the successor trials, the latest of which was the one in London.

Belarus is a small nation which emerged out of the old USSR. It has a history of occupation by Russia, Poland and Germany. During the last German occupation there was a proud and heroic resistance which fought against the brutal occupiers; Sawoniuk was a collaborator with those occupiers, implementing their indiscriminate and bloody suppression of the popular partisan movement. Fedor Zan's uncle, aunt and cousins were murdered by a raid in which Sawoniuk participated. Borisy, where the Belorussian witnesses came from, was a partisan village. This spirit of Belorussian patriotism was subsumed under Soviet domination until 1989 when it re-emerged as an independent nation; one which was finding a voice of its own in the international community.

Perhaps a fourth nationalist social memory which impacted on the trial was a British one. The wood panelled court-room; the wigs of the court officials; the impeccable manners of Nutting and Clegg; the history of the 'Old Bailey'; these all told of British fair play, understatedness and reasonableness. British law allowed only charges of murder 'against the common law'; nothing continental or ideological like crimes against humanity or genocide. Britain did not allow itself to be invaded during the war; and it was central in the defeat of Nazi Germany. However, notwithstanding the

heroic role which it played, Britain is not a place for show trials. It is the nation that invented fair play.

Another form of narrative presented to the court was that given by Chris Browning; a narrative created by the norms and rules of academic historiography. This tradition takes all of the available evidence, documents, eye witness testimony, trial transcripts, other historiography, and carefully and methodically builds up the best picture of the truth which the evidence allows.

It was the task of the court to hear testimony which was necessarily informed by these differing narratives, to process it and work on it according to its own legal rules and norms, and to produce a judgement which was free of these contradictory nationalist influences. It is as if a cosmopolitan court is a machine whose inputs are national narratives, but whose output is a single cosmopolitan one. The hardware of the machine is a set of quickly developing cosmopolitan institutions; the software, is the quickly developing body of cosmopolitan law and the increasingly clear and precise body of rules, procedures and precedent which is being produced by the institutions.

Crimes against humanity are exactly the kind of events which national social memories make and are made of. In order for them to occur in the first place, there are inevitably sophisticated and widely held national narratives which tell why the other group needs to be disposed of. The Jews have, through the ages, been the cause of Germany's defeats and problems; the Moslems in Bosnia have, through the ages, been collaborators with the invaders against Serbs; the Tutsi in Rwanda have been, through the ages, the oppressors of the Hutu. This is one of the central reasons why international courts are necessary. It is necessary to create institutions to deal with these crimes which

have some chance of raising themselves outside of myths of nationhood and of ethnic superiority. Understandably enough, when a group or a nation has survived such severe disasters as genocide and ethnic cleansing, it weaves the narratives of these disasters into its own tapestry of identity. When a court comes to address these events then, it is forced to attempt to abstract the story of what happened from its powerful imbeddedness in narratives which are central to conflicting national identities.

A central task of the ICTY is to carry out this work. It hears evidence wrapped up in Croatian, Bosniac and Serbian narratives; it also hears academic evidence. It is also able to hear evidence from organisations which are already self-consciously trying to become cosmopolitan, to differing extents, such as NGO's and UN peacekeeping forces. The rules and norms by which it constructs a cosmopolitan narrative are those of international law. The ICTY is engaged in the task of creating and building those rules and norms. It is borrowing principles and procedures from different legal traditions and binding them into a body of law and precedent. It produces judgements which are, literally, in the form of narratives.

David Irving often attempted to present himself as an English nationalist rather than a neo-Nazi but the narrative of Englishness which he attempted to present was an unusual one. In court, and also in a television interview with Jeremy Paxman on the night of the verdict, he presented his racism as nothing more than a genuine expression of English patriotism.

Paxman: *You said in your dairy that you recited [the verse 'I am a baby Aryan'] as you passed a half breed*

Irving: Yes indeed

What is a half breed?

It's something that didn't exist in England at the time that I was born here, shall we say?

*A half breed, you would accept is a term of racial categorisation,
I think You're absolutely right
as is aryan
You're absolutely right
And you're seriously trying to maintain that there's nothing racist about this
verse
It's a vestige of English patriotism in me and of my Englishness, not of racism I
think You'll find that 95% of English people of my generation hold exactly the
same attitude.
I have never heard 95% of people of your generation reciting racist verse like
that.
You've got to be able to write good verse, yes.*¹⁸

Irving's portrays his version of English nationalism as *genuine*, the view of the silent 95 per cent, rather than the *official* post world war II version of the 'traitors' like Lord Hailsham, whose treachery consisted in advising the British cabinet in 1958 not to bring in immigration controls. The official version is the multi-culturalist one which emerged after the mistaken war against Hitler, who, incidentally, knew nothing about the Final Solution. Events during that war, such as the mass campaign of aerial bombing of German cities, were presented by the official narrative of Englishness as heroic military victories. It required Irving's *genuine* history to be written of the bombing of Dresden, which showed that when England was run by the 'traitors' it fought its misguided war against Hitler and committed atrocities far greater than those committed by England's *genuine* friends. It only requires David Irving to show the 95% of honest English racists the true history of the second world war for them to see through the official nonsense and revert to their instinctual racism. Thus, if only Irving could explain the truth clearly enough, everything would revert to its natural state. He explained to Paxman,

[T]hose who were in the courtroom will remember today that at the end of the trial I said to the judge that I have to apologise for the fact that I have failed to

¹⁸ *Newsnight*. BBC Television, 12 April 2000.

express myself with sufficiently articulate language so that you have understood the historical problems with which you are confronted in this case.¹⁹

To what extent Irving believes in his alternative version of English nationalism rather than in some sort of German nationalism or supra-national Nazism is not clear. In Irving's narrative, there is a convergence between English and German nationalisms; his re-writing of history was also a re-writing of German history and of Germany's historical relationship with England. Its conclusion is that there should have been no war between racial brothers.

In court Irving's strange narrative of English and German nationalism, and of the nationalism of the white race, was being judged against an academic historiographical narrative; one which Irving would have called a Jewish cosmopolitan narrative.

It could be argued that the court was not a cosmopolitan one, but rather was one which represented the official history of Englishness against Irving's dissident version. But it was the nature of the subject matter and the nature of the evidence presented by the Lipstadt team which pushed the British court onto a cosmopolitan terrain. The crimes of the Nazi regime were committed throughout Europe; they had already been the subject of the Nuremberg tribunals, the first supra-national courts; the claims of the Holocaust deniers are not bounded by any national boundaries; Irving's commentary was daily put on his website and accessed globally; trials similar to this had occurred in other jurisdictions, such as criminal trials for the crime of Holocaust denial in Germany or the Zundel case in Canada. Lipstadt is an American whose book had been published all over the world. She had been sued in England because that was where Irving thought he had the greatest chance of success. The academic witnesses were American, Dutch, English

¹⁹ *Newsnight*. BBC Television, 12 April 2000.

and German. Many factors, therefore, contributed to the British court being forced to play a cosmopolitan role. The judgement which it produced was three hundred pages of cosmopolitan narrative.

Chapter 8

CONCLUSION

David Kairys tells us that the primary myth which law tells about itself is the conception that it is “separate from – and ‘above’ - politics, economics, culture, and the values or preferences of judges or any person”.¹ It promises to be a system of decision-making which is fair, neutral, and predictable. Government of law not people, promises to remove the arbitrariness of subjective decision-making; decisions are made by a process in which

(1) the law on a particular issue is preexisting, predictable, and available to anyone with reasonable legal skill; (2) the facts relevant to the disposition of a case are ascertained by objective hearing and evidentiary rules that reasonably ensure that the truth will emerge; (3) the result in a particular case is determined by a rather routine application of the law to the facts; and (4) except for the occasional bad judge, any reasonably competent and fair judge will reach the “correct” decision.²

Legal authority is separated from political authority; the process for making particular decisions is separated from the process of making general decisions.

Critical legal studies provides us with a substantial critique of legal theory and practice. It shows us how law can never be ‘above’ the rest of society but is emphatically a part of it. The inequalities of wealth and power are reflected in law, not overcome by law. Indeed, law is one of the institutions by which those inequalities are created and maintained. Equality before the law is an abstract equality of right, not an equality of substance. “Equal right is a right of inequality in its content, like every right.”³ The problem is not that courts fail to live up to the standards which law promises, but that

¹ Kairys, D., Ed. (1998). *The politics of law: a progressive critique*. New York, Basic Books p. 1

² Kairys (1998) p. 2

³ Marx K. (1968) 'Critique of the Gotha Programme', *Marx Engels Selected Works* New York:

“there is no legal methodology or process for reaching particular, correct, results”.⁴ It is not that law deviates from its own ideals, but the ideals themselves which are at the heart of the problem.

Kairys gives the example of the abortion controversy in the USA. The law embraces principles of privacy, individual choice and gender equality in sexual and reproductive matters; at the same time, it promises protection and preservation of life and health. However, he argues, the law does not provide any method or process for determining neutrally or objectively which competing values are more important. Thus, when decisions are made by judges, they are made with no more authority than if they were made by any private person; they are simply made according to the value system held by the individual making the decision. But the value system of the judge is not random: it is selected and created and buttressed by a lifetime of legal education and practice and so is in tune with the interests of those who hold the power in society. When these kinds of political decisions are kept within the legal rather than the democratic system, it is done in order to depoliticize the issue, argues Kairys. The issue is supposed to be decided by objective and fair judges rather than by the passionate and irrational people. The decision is imagined to be based on the application of previously agreed principles, rather than the creation of a new principle. But the effect is to diminish the sphere of democracy and enlarge the sphere of legal decision-making. In this way, more and more decisions are taken out of the scope of the democratic process.

Behind the façade of fairness, impartiality and disinterestedness lies, according to critical legal studies, the reality of a set of institutions which act in the interests of the rich

⁴ International Publishers. p. 324
Kairys (1998) p. 4

and the powerful. The real relations of power in our society, those of class, race, gender and imperialist domination are hidden by the fig leaf of due process. There is a criminal justice system which criminalizes the poor and disadvantaged.

The vast majority of those behind bars [in the USA] are poor, 40 percent of state prisoners cannot read, and 67 percent of prison inmates did not have full-time employment when they were arrested. The per-capita incarceration rate among blacks is seven times that among whites. African Americans make up about 12 percent of the general population but close to half of the prison population. They serve longer sentences, have higher arrest and conviction rates, face higher bail amounts, and are more often the victims of police use of deadly force than white citizens.... Nationally, for every one black man who graduates from college, one hundred are arrested.⁵

Carol Smart argues that law exercises power in such a way as to disqualify women's experience and knowledge. She argues that law is so deaf to the core concerns of feminism that feminists should be extremely cautious of how and whether they resort to law.⁶ She sees law as a signifier of masculine power; a discourse entirely removed from women; one which is inherently hostile to their interests. Again, the feminist critique of law is not one which aims to push law closer to the ideals to which it aspires, but one which finds the ideals themselves entirely created by the powerful in their own interests.

Some critiques of law, for example that of Carole Pateman⁷, have a principled position against law, and against the assertion of rights as a means of gaining power for the powerless. She argues that from its very beginning in the work of Rousseau, the fight for the rights of man was literally only that. Rousseau wanted to behead the King in order to establish the fraternal rule of the sons. She argues that the legal conception of

⁵ Cole, D. (1998). 'Two systems of criminal justice'. in *The politics of law*. D. Kairys (Ed). New York, Basic Books p. 411

⁶ Smart, C. (1989). *Feminism and the power of Law*. London, Routledge p. 2

⁷ Pateman, C. (1993). 'The fraternal social contract'. in *Civil society and the State*. J. Keane (Ed).

the abstract individual citizen is presupposed to be male and the female is assumed to be confined within the private sphere, inside the family and outside of the public and political sphere.

Others, for example that of Mark Tushnet,⁸ are more pragmatic, moving from a principled critique, to a strategic one, arguing that at certain times the reliance on law and on rights is more fruitful; at other times, it is more dis-empowering and politically demobilizing.⁹

Critical legal studies is related to the critique of state developed by the civil society theorists which I discussed in the introduction. It sees law as part of the system and emphatically not part of the life-world. It is a part of the machine where decisions are made in the private interests of the powerful and enforced through their control of the state. It uses all of the rational decision making techniques which for Bauman signifies the totalitarianism inherent within modernity and for Pateman signifies its masculinity. Kairys says that "it is hard to imagine a transition to a more humane, moral society that is not popularly driven and substantially if not primarily focused on democracy".¹⁰ Many of the critical legal studies theorists argue that legal rights divert a popular movement and give it a false sense of security. The winning of a legal right is nothing more than a signifier of the fact that the movement is powerful enough to assert itself; and if at some

London, Verso.

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Tushnet, M. (1984). "An essay on rights." *Texas Law Review* 62.

It is interesting that at the present time, the judges at the European Court of Human Rights appear to be significantly more liberal in their decisions than the elected British Government; currently it is the right not the left who are mis-trustful of the judges. In the 1970's however in the UK, it was the judges who made a string of decisions against the trade unions which pleased the right but disappointed the left. According to Tushnet the Judiciary in the USA in the 60's was more liberal than the Government, making a series of decisions in favour of civil rights and abortion rights, and the rhetoric of the right when Reagan came to power was against that liberal judicial activism. Perhaps the recent decision of the Supreme Court to give the presidency to George W Bush indicates yet another change in the cycle.

point in the future the movement loses strength and organisation, which it probably will since its legal victories will make it complacent, then the legal right is un-enforceable. A movement should not rely on the state and on judges to provide its needs from above, but should organise independently of the state from below, it should mis-trust the state, and it should not allow hollow legal victories to de-mobilise it.

It is not difficult to broaden the thrust of these arguments into the realm of international or cosmopolitan law. Supra-national law is not only the property of the wealthy, but is the property of the wealthy states, the imperialist states. Human rights, UN peace keeping and cosmopolitan criminal law are the hypocritical tools by which imperialism is able to dominate the world in the era when colonialism has been discredited and the cold war is no longer available as cover. Ethical imperialism¹¹ and globalization keep the world safe for capital. Coates¹² argues that the NATO bombing of Kosovo and Serbia in 1999 was nothing but an action for of the strategic interests of the powerful carried out under the cover of cosmopolitan legality and human rights. Falk echoes the argument that power must be self-won by the excluded, rather than awarded in the form of legal rights from above:

[T]he indigenous struggle ... reinforces the point that unless authentic participation in the rights-creation process occurs, the results are not likely to be genuinely representative and the whole process [of the UN system] will be regarded as illegitimate and alien.¹³

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Kairys (1998) p. 13

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Coates, K., Ed. (1999). *Ethical Imperialism: The war after the war*. The Spokesman. Nottingham, Bertrand Russel Peace Foundation.

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Coates, K., Ed. (1999).

¹³

Falk, R. (1997). "False universalism and the geopolitics of exclusion: the case of Islam." *Third World Quarterly* 18 (March) p. 11.

Falk also argues that Islamic civilisation has been excluded from the supposedly universal world of the UN and cosmopolitan law. Davutoglu¹⁴ argues that while the anti human rights policies of Israel have faced little criticism from the international system, such policies when carried out by regimes which the powerful wish to fight against, such as Iraq or Serbia, lead to international action. The Intifada, he argues, is labeled as terrorist, whilst the mass rebellions in Eastern Europe are seen as victories for freedom. When Muslim states like Kazakhstan and Pakistan acquire nuclear weapons it is painted as a global threat and its illegality is highlighted.

So we are faced with a number of criticisms of cosmopolitan legal processes. First, that cosmopolitan criminal courts are nothing but the tools of the powerful, and their claimed independence, fairness and neutrality simply covers the reality. The courts are set up by and work in the interests of, the great powers.

Second, that the reliance on law demobilizes a bottom-up movement in favour of a top-down system. It is better for the dis-empowered to organise themselves independently, not appeal to legal systems which are the instrument of their oppressors, and to become powerful in their own right.

Third, that the rules of evidence, the norms and practices of cosmopolitan courts, are designed to allow the judges great freedom to be able to judge in the interests of the powerful rather than to follow the law. Indeed, international law does not really exist since there is no international legislature. Fair trials are impossible, even more than in national criminal courts, because there are even fewer safeguards such as juries.

¹⁴ Davutoglu, A. (1995). Civilizational transformation and the Muslim world, University Press of America, p. 103

Fourth, that individuals, not even significant individuals, are scapegoated for crimes of states for which modernistic, capitalistic social structures are actually more responsible.

Fifth, that when cosmopolitan courts produce narratives, they are producing imperialist ideology rather than versions of events which are free from nationalistic particularity.

I wonder, if law is so totalitarian, why the totalitarians themselves had such disdain for it. Why, under Hitler, did law become its opposite, as expressed by Hans Frank's categorical imperative of the Third Reich? 'Act in such a way as the Führer, if he knew your action, would approve it'.¹⁵ When the rules are arbitrary, retroactive and secret, they cannot, argues Fuller,¹⁶ rightly be called law at all.

Arendt¹⁷ describes the totalitarian movement and the creation of the new mass man, the man for whom nothing is of consequence apart from the ideological struggle; she describes the way the movement consists of a mass of atomized and furious individuals; she describes the way the movement puts everyone in mortal competition with everyone else; the way the movement breaks out of civil society and smashes the institutions of state, of law, and of democracy and rules without them. Franz Neumann's¹⁸ picture of Nazi Germany is also one whose fundamental novelty is its eradication of the rule of law and the structures of state. Arendt and Neumann's picture

¹⁵ Arendt (1994) p. 11.

¹⁶ Fuller, L. L. (1969). *The Morality of Law*. New Haven, Yale University Press..

¹⁷ Arendt, H. *The Origins of Totalitarianism* (1975) San Diego, Harvest.

¹⁸ Neumann, F. (1963). *Behemoth - The Structure and Practice of National Socialism 1933 - 1944*. New York, Octagon Books Inc.

¹⁹ Bauman, Z. (1993). *Modernity and the Holocaust*. Oxford, Polity.

of totalitarianism in power is different from, for example that of Bauman¹⁹. Bauman sees Nazi extermination as a result of the legal development of the technology of annihilation, while Arendt and Neumann understand it as a revolt against the hypocritical and failing bourgeois structures of state, democracy and legality.

The irony is that the Nazi critique of law and of state and of democracy has more in common with that of the critical legal studies scholars than either would like to notice. I say this not to libel those left critics, and attempt to thrust upon them the epithet of 'Nazi'; rather, to notice that it is easy to formulate a critique of law, and of representation, since the official doctrines of law and representation are becoming increasingly transparently inadequate. Arendt says in relation to the post-first world war elite, that "[s]imply to brand as outbursts of nihilism this violent dissatisfaction with the prewar age... is to overlook how justified disgust can be in a society wholly permeated with the ideological outlook and moral standards of the bourgeoisie."²⁰ When law is hypocritical and unfair it is natural to react with contempt for its arrogance in power. Both Nazi and left critiques prefer the self-activity of autonomous popular movements to the rationality, regulation, hierarchy and hypocrisy of law. Both are contemptuous of the claims of the democratic politicians to represent the real views and needs of the people. Both see through law's claim to be impartial; both understand that the courts represent the powerful. Both see the cause of the problems of society to lie in the attempts of the system, or the state, to regiment and mould the 'free' citizens into perverted shapes so that they can exist within the existing order. Both feel that life-world is better than system.

²⁰ Arendt (1975) p. 328. See Fine, R. (2001). *Political Investigations: Hegel, Marx, Arendt*. London, Routledge.

Is it possible to break out of this dualism, and view the ‘opposite’ spheres of social life, civil society and state, life-world and system, in a different way? Instead of understanding autonomous popular movements as good and state as bad; or immediate democracy as good and representative democracy as bad; or subjectivity as good and objectivity as bad; or passion as good and reason as bad; can we not understand the dialectic of modernity to exist within all spheres of social life simultaneously? We can replace Bauman’s one-sided critique of modernity with an attempt to understand the genuine complexities of social life. We can replace Havel’s one-sided critique of politics with a deeper understanding; we can go beyond the cynicism of the man in the pub who says that politicians are all the same. We must be able to hold the critique in one hand, and the critique of the critique in the other hand, without dropping one or the other in frustration and becoming either just an empty critic or just a frightened conservative.

...[T]he task of the writer...may be said to consist in the discovery of truths... But if we consider how this task is actually performed, we see on the one hand how the same old brew is reheated again and again and served up to all and sundry – a task that ... might sooner be regarded as the superfluous product of over-zealous activity – ‘for they have Moses and the prophets; let them hear them’.

Hegel²¹

It is not enough simply to re-heat Rousseau’s critique of representation and serve it up again, even if his critique is a remarkable and insightful one, and full of truth. We can see how the rich, fresh, complex and original critique which Marx formulated of bourgeois society has been constantly re-heated and re-served for a hundred years until we are offered a stale, clichéd and utopian version with no more to offer than the Old

²¹ Hegel, G. W. F. (1991). *Elements of the Philosophy of Right*. Cambridge, Cambridge University Press, p. 11. c.f. Fine (2001)

Testament. We cannot understand the world only in our heads or in our seminar groups but it is necessary to study its actual development.

To recognize reason as the rose in the cross of the present and thereby to delight in the present – this rational insight is the *reconciliation* with actuality which philosophy grants to those who have received the inner call to *comprehend*...

Hegel²²

This thesis is about tracing the trajectory of the development of cosmopolitan criminal law as it exists. Cosmopolitan law is hypocritical and unfair; it is saturated with *realpolitik* and the fear of the great powers; it is compromised by its partiality; it is crippled by its lack of money, resources, publicity and political support; (and there is so little of it!). I do not want to re-heat the old brew of cynical critique nor do I want to weave utopian dreams of a world made safe by good policemen and judges; I focus on the actually existing developments, and search for the rose in the cross of the present. There is a seed within the compromised present which is as radical and exciting as the utopian dreams; there are also trends, potentialities and events which are as dark and terrifying as the nightmares of the cynics.

The strongest critique of the existing cosmopolitan courts is that the process which decides who will be tried is entirely problematic. The ICTY is possible because it does not threaten the interests of any of the great powers. There have been no trials of Americans for the Vietnam war, no trials of Russians for Chechnya, no trials of Chinese people for Tibet. Is it possible for cosmopolitan courts to have any genuine independence from the great powers? At the moment, there is not much independence, but there is some. The great powers, with their vetoes in the security council are in control of where and when *ad hoc* tribunals are set up, and under the ICC treaty they will be in control of

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Hegel (1991) p. 22

where and when the ICC prosecutors will be allowed to investigate. However, that control is never absolute and guaranteed by the powers. Social institutions, have emergent properties; they are never absolutely 'sewn up'. Bourgeois domination of social life, in contrast to totalitarian domination, allows space and relative freedom for social institutions to change and develop and live. Even if human rights and due process were only rhetoric, which they are not, then the rhetoric itself would grant some space and autonomy to the institutions which are based upon it. It is clear that the judges and the prosecutors have a certain independence of action within their limited spheres. The judges are not told how to find. The chief prosecutor showed herself able to indict Milosevic at a moment during the Kosovo conflict when it might have been inconvenient for NATO. As Kirchheimer²³ argues in relation to Nuremberg, one method available to the great powers of reacting to genocide is due process. The great powers decided, for their own reasons, to allow the *ad hoc* tribunals to administer a small part of their power by prosecuting some of those responsible for crimes against humanity. An event can be both a manifestation of power and a legal trial at the same time. As Rosalyn Higgins²⁴

²³ Kirchheimer (1969)

²⁴ Higgins, R. (1999). *Problems and Process: International Law and How We Use It*. Oxford, Oxford University Press.

argues, authority does not lie proudly apart from power, but law is to be found at the intersection of authority and power. It is a means of asserting power, but not arbitrary power.

Human rights are the values by which cosmopolitan courts make their decisions and also by which the courts advance the law and rules by which they operate, in the absence of a legislature. Can it be rightly argued that human rights are nothing more than a means for the pushing of 'western' (or 'male' or 'bourgeois') values onto the rest of the world? It is particularly hard to make this criticism stick when discussing crimes against humanity. As far as I am aware, there is no-one who argues that genocide is traditional in a particular 'culture', and therefore the imperialist west has no right to march in and thrust its own values onto the those for whom genocide is an age-old and legitimate way of life. If human rights mean anything, then they mean that there is universal agreement that a social formation, a group of people, must not be allowed to murder entire populations. The argument that human rights are just the values of the rich does not fare much better with less extreme examples of threat than genocide since human rights abuses are perpetrated by the powerful against the powerless. And the argument that human rights abuses are traditional within particular cultures and therefore should not be criticised leave those voices for freedom within those 'cultures' isolated and unsupported. Such an argument is often, anyway, a mis-representation of the actual 'traditions' of the 'culture' in question.

Are human rights limited because they are individual rather than collective? This argument does not make much sense in relation to crimes against humanity since such

crimes are inevitably committed against a group. The right not to be a victim of genocide is not primarily an individual right, but is a right of communities.

Would people in immanent danger of genocide be better off relying on their own self-organisation than on the international community and cosmopolitan law? Would a person being mugged on the street be better off attempting to defend themselves or to wait for the police or a criminal trial for their assailant? Certainly, there is a right to self-defence, and self-defence, if it is possible, must be the best policy. Crimes, however, are committed against people or groups who are unable to defend themselves, who are unable to stop the crimes being committed. If self defence was always possible then law would be redundant. Conversely, if law was effective, then self defence would rarely be needed. There is no necessary conflict between international intervention from above and self defence from below; a conflict is possible, but not inevitable.

There was a conflict in Bosnia between outside help and self-defence. For example, in Srebrenica, the UN forces actively persuaded the Muslims to stay in their homes, and they brokered an agreement of which it was a condition of outside help that the Muslims should disarm. Similarly in Kosovo, those at risk of genocide were forced to disarm and give up their claims to statehood before international help was forthcoming. At the time of the war in Bosnia, there was some disagreement between the Americans who leaned toward a policy of arming the Bosniacs so that they would not need themselves to intervene, and the Europeans, who wanted to keep the arms embargo in force as a price for their own 'help', thus dis-empowering the Muslims in particular, since the Serb forces were already well armed. This is a complex issue, but it is not an argument which suggests that the international community should refrain from

intervention in order to help those at risk from the greatest imaginable crime for fear it might inhibit the efforts of the victims to defend themselves; neither is it an argument which suggests that when self defence has been unsuccessful, the perpetrators of the crime should not be brought to justice. It warns people at risk to be mistrustful of those who suggest that they should sacrifice self-defence in order to encourage outside help. And it means that in some situations, such as that in Bosnia, the international community must be more clear about who is attacking who and who is at risk of genocide from whom. A policy of neutrality between criminal and victim will not do; neither will one which seeks to prevent an unarmed victim from arming itself in self-defence. At the same time, it is true that self-defence against a perceived threat of genocide will often take the form of nationalism; and that the most dangerous, exclusive and ethnic nationalisms always present themselves as being at a special and immanent risk of eradication from outside; aggression is often presented as self-defence. These points do not bolster an argument against cosmopolitan law. The best situation is one in which outside intervention and local self-defence bolster and re-enforce each-other; where legal proceedings against perpetrators strengthen and give confidence to indigenous movements, and those local campaigns and forces demand and thereby add strength and legitimacy to international help. When a group is in immanent danger from genocide, they are by definition, unable to defend themselves. Then, the world is faced with a choice; intervene or watch.

Is it possible for cosmopolitan trials to be fair trials? The jurisdiction which is organising the trial may not have state power where the offence was committed; witnesses may be hostile or intimidated; forensic evidence may be difficult to collect:

there may be language barriers and a conflict of national cultures; judges may be biased, particularly in the absence of juries; witnesses may be politically motivated; rules of evidence may have to be more loose than in national trials; media coverage can warp and infect testimony; witnesses can be provided by governments hostile to the defendant; the great powers can require certain politically useful verdicts. The best way I can answer this question is to say that the trials I have observed and reported in this thesis have been, more or less, as far as I can judge, fair trials; the courts have developed strategies to overcome these difficulties. The empirical evidence presented in this thesis shows that it is harder to organise a fair trial in these circumstances, but it is possible. The judges who I have observed, particularly in the Sawoniuk, Tadic, Blaskic and Irving cases, have appeared to be thoughtful and fair.

Are individuals scapegoated for crimes for which there is in fact, much wider responsibility? The Lockerbie trial was held in the Netherlands, under Scottish law, to try two defendants who had been handed over by the Libyan state for the bombing of an American airliner. This trial seems to have exemplified some of the possible shortcomings of cosmopolitan law. It was, like the Sawoniuk and Irving cases, a hybrid of national and cosmopolitan justice. It seems, however, to have been more compromised by the requirements of *realpolitik* than the crimes against humanity trials which I have studied. One defendant was found guilty on shaky circumstantial evidence; the Libyan state and secret service seems to have been offered some sort of *de facto* immunity in return for handing over the suspects; Britain and the USA want to appear to have secured justice in order to relieve the pressure put on them by the families of the

victims. Now 'normal' relations between Britain and the USA and Libya can be resumed.

The trials which I have reported in this thesis are not compromised in the same way as the Lockerbie trial. The conviction of Sawoniuk did not thereby exonerate Hitler; the conviction of Tadic did not exonerate Milosevic; Blaskic did not exonerate Tudjman. While these three are certainly unlucky to have been brought to justice, since the vast majority of their comrades have escaped, their sentences were not unjust. They were not scapegoats. The failure to try Hitler and Milosevic (so far) and Tudjman, while they are serious failures, do not make the trial of less central figures meaningless.

Against those who argue that international relations are only determined by power, I have argued that processes of decision-making which rely on the authority and due process of law also have some influence.

Against those who argue that the only legitimate sovereign is the national state, I have argued that crimes against humanity have been recognised as the business of all human beings and therefore global institutions are developing which have jurisdiction within all states to prosecute such crimes.

Against those who argue that individual criminal responsibility for these crimes is just a legal fiction, I have argued that those who perpetrate crimes against humanity have had alternatives and that while their alternatives may have been severely constrained, they were still free choices.

Against those who argue that cosmopolitan law is utopian, I have shown that in the ICTY and the ICTR, it is coming into being.

Against those who argue that the practical difficulties in organising fair trials for such crimes are insurmountable, I have presented evidence that fair trials are indeed being held.

Against those who argue that cosmopolitanism cannot hope to pull people away from their own sacred myths of nationhood, I have shown one mechanism by which a cosmopolitan social memory is being forged.

In the introduction to this thesis I asked, whether there were sparks and flashes of cosmopolitanism in the darkness of totalitarianism, and if they existed, then what did they illuminate and what was their significance? I have argued that in cosmopolitan criminal law, we can see coming into being one new way of challenging totalitarian horror. Rather than a smooth and institutional process of civilisation, I have argued that it is more fruitful to understand these trials as shards of light in the darkness. We do not know how things will develop; whether processes such as the Nuremberg tribunals, the ICTY and ICTR will appear to history as the beginning of the coming of age of a new form human regulation, or simply as isolated and compromised sparks in the darkness. Even if they do remain nothing more than historically isolated examples of flawed cosmopolitanism, their existence will still have been remarkable and profound as flashes of light in the darkness, even if the sparks were unable to ignite a more enduring flame.

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